In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1529

STEPHEN HATHAWAY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

C. THOMAS ZINNI
53 Mount Vernon Street
Boston, Massachusetts 02108
(617) 523-3245

Of Counsel:
MICHAEL W. PESSIA
RICHARD E. WOOD

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Petitioner, Stephen Hathaway prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on March 24, 1976.

Opinions Below

The text of the opinion of the Court of Appeals in this case is reprinted as Appendix D hereto, *infra*. The text of the judgment order is reprinted as Appendix C hereto, *infra*. The trial in the District Court was by jury and no opinion was filed by the District Court.

Jurisdiction

The judgment order of the Court of Appeals was entered on March 24, 1976. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(1).

Questions Presented

I. The opinion of the Court of Appeals is in conflict with decisions of this Court and there is conflict between the other circuits on these issues.

II. Were the Petitioner's Fifth Amendment due process rights abridged by (1) the Government's failure to comply with the District Court's discovery order; and (2) the admission of evidence through four witnesses immunized in violation of 18 U.S.C. § 6003?

III. Did the trial court commit error and thereby violate the due process rights of the Petitioner in charging the jury that the Petitioner could be convicted under the Travel Act upon a finding of mere receipt by the Petitioner of payments voluntarily made by the putative victim Graham thus allowing the Government to proceed on inconsistent theories?

IV. Did the trial judge err in instructing the jury that travel or use of the mails by a non-defendant putative victim was sufficient basis for finding a violation by the Petitioner of the Travel Act, 18 U.S.C. § 1952?

Constitutional Provision and Statutes Involved

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The following statutes are set out in the Appendix E due to their length:

18 U.S.C. § 2 (June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, § 176, 65 Stat. 717).
18 U.S.C. § 371 (June 25, 1948, c. 645, 62 Stat. 701).
18 U.S.C. § 1951 (June 25, 1948, c. 645, 62 Stat. 793).
18 U.S.C. § 1952 (Added Pub. L. 87-288, § 1 (a), Sept. 13, 1961, 75 Stat. 498, and amended Pub. L. 98-68, July 7, 1965, 79 Stat. 212).
18 U.S.C. § 2514 (Added Pub. L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216).
18 U.S.C. § 6003 (Added Pub. L. 91-452, Title II, § 201 (a), Oct. 15, 1970, 84 Stat. 927).

Statement of the Case

Petitioner seeks a Writ of Certiorari to review the judgment order of the United States Court of Appeals for the First Circuit, entered in this case on March 24, 1976, affirming the convictions of the defendant Stephen Hathaway. The District Court had jurisdiction over the substantive offenses described in 18 U.S.C. §§ 2, 371, 1951, and 1952.

Prior Proceedings and Facts

On March 19, 1975, a six count indictment was returned against the Petitioner.

After a trial by jury in the District Court, the Petitioner was convicted on Count I of having conspired to obstruct, delay and affect interstate commerce by extortion of $25,000.00 from Thomas A. Graham as President of Meridian Engineering, Inc. induced by the wrongful use of fear of economic loss and under the color of official

right; on Counts III and V of obstructing, delaying and affecting interstate commerce by extortion from Thomas A. Graham as President of Meridian Engineering, Inc. of $25,000.00 in 1971 and $5,000.00 in 1972 in violation of the Hobbs Act, 18 U.S.C. § 1951 and 2 (A. 8, 11, 12); on Count II of having conspired to cause others to travel in interstate commerce to carry on an unlawful activity in violation of 18 U.S.C. § 371 (A. 7); and on Counts IV and VI of causing others to travel in interstate commerce and to utilize the facilities in interstate commerce to carry on an unlawful activity in violation of 18 U.S.C. § 1952 and 2. (A. 9, 13-14).

The Petitioner was sentenced to a term of two years the first four months to be served in jail and the balance suspended with probation for twenty months, and was ordered to pay a fine of $12,000.00. Execution of sentence was stayed pending appeal. (A. 860-861).

At the trial there was evidence of the following:

The co-defendant Howard Baptista was the Executive Director of the New Bedford Redevelopment Authority. The Petitioner Stephen Hathaway was the sole proprietor of Stephen Hathaway Construction Materials Suppliers Co. of West Roxbury and Manchester, Massachusetts.

Thomas A. Graham was the Chairman of the Board and President of Meridian Engineering, Inc. (hereinafter referred to as Meridian). Meridian was a design engineering and construction management firm with its principal office in Philadelphia, Pennsylvania. (A. 48).

Graham admitted at the trial that prior to his meeting with Baptista in June, 1971, he had, systematically, as Chairman of the Board and President of Meridian, committed the following illegal acts:

(1) Graham disbursed $5,000.00 to the Majority Leader of the Pennsylvania House of Representatives, Joshua Eilberg, by personally delivering cash on three or four

occasions, in return for a contract on Temple University. (A. 591-592).

(2) Graham disbursed $25,000.00 total in cash to the State Treasurer of New Jersey, one Kervick, for work at the New Jersey College of Medicine and Dentistry, delivering $1,000.00 sums in hand on approximately twenty-five occasions.

(3) Graham disbursed $58,000.00 between 1970 and 1973 to a New Jersey attorney, one Colsey, who was helpful in getting jobs, deducted as attorney fee payments on Meridian tax returns. (A. 603-604).

(4) Graham disbursed between $20,000.00 to $30,000.00 to the Mayor of Lancaster, Pennsylvania, in amounts of $1,000.00 delivered by him in cash in hand. (A. 605).

When asked whether he had difficulty getting money out of the company whenever he needed it to give bribes to these people, he replied "No." (A. 608). Graham further admitted that he had developed a scheme through which Meridian got tax deductions for cash disbursements out of a so-called "administrative travel fund." (A. 598-599).

> "There were three purposes of charges that I used to make to the administrative travel account: One would be the administrative travel, the second would be political contributions or payments, and the third one would be money that I also had taken personally on occasion." (A. 595).

The total of these three categories over the period from 1970-1972 was in excess of $715,000.00, all deducted from Meridian's gross income. (A. 661-662). Of the three purposes stated by Graham, he admitted that the largest amount was for his personal use. (A. 596).

Meridian obtained two contracts with the New Bedford Redevelopment Authority, the first in the summer of 1971

on the West End Urban Redevelopment Project (hereinafter referred to as WEP) and the second in the summer of 1972 for the Neighborhood Development Project (hereinafter referred to as NDP). (A. 63, 121). In early 1971, Meridian worked as a subcontractor on the WEP, under the project consultant Lucas & Edwards, Inc., a firm no longer in existence at the time of trial. (A. 50).

There was also evidence, if believed, of the following:

Graham met Lucas[1] on an unspecified date at which time the WEP project was discussed. On June 30, 1971, Graham and Lucas travelled to New Bedford by private plane where for the first time ever Graham spoke with and met Howard Baptista. (A. 58). Either before the flight or en route, Graham developed and wrote out a schedule (A. 614-620) containing the words "invoice date", "address", and "amount", with figures adding up to $25,000.00. (A. 66, 614-619). To this request, Graham stated that Baptista gave him four invoices of a contractor friend to use as a vehicle.

The four 1971 invoices were allegedly mailed to 59 Raymond Street, Manchester, Massachusetts. Margaret R. Hathaway, who had resided at that address for 15 years, testified that Stephen Hathaway had departed permanently from the residence in 1964. (A. 712). She had received no mail whatsoever since 1970 to the present time for Stephen Hathaway at that address. (A. 712).

Of the events occurring in 1972, Graham testified about two meetings on consecutive days. (A. 647). The first meeting occurred on August 2, 1972, in New York with a Mr. Jerry Sands, whom Graham used on two or three occasions as a "money laundry." (A. 643-647). On those

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[1] Lucas was known to the grand jury, but never testified before the grand jury or at the trial. During argument on Requests for Instructions, the Government stipulated with Defendants, and the Court so charged that the only conspiracy which could be found was between Hathaway and Baptista.

occasions, Sands provided Graham with dummy invoices used in the following manner:

> "The arrangement proposed by the proposer, not Mr. Sands, was that Mr. Sands be instructed to send invoices, to type and send invoices to our company on the occasions when I would want cash, and I would then authorize disbursement of money to Mr. Sands. He would take a tax bite, defined as 35 percent and keep the balance in an account that I had opened specifically for that at the Chase Manhattan Bank in New York." (Thomas Graham, A. 645).

On the following day, August 3, 1972, a meeting arranged by Mr. Graham between himself and Howard Baptista occurred. (A. 647). Graham testified that the following events and discussions occurred:

Prior to the meeting he had arranged, Graham prepared a schedule similar to the one he had prepared in 1971. (A. 137) (Ex. 3, A. 792).[2] He went to New Bedford and confronted Baptista about the future award of the NDP contract. He offered to arrange a series of payments totalling $5,000.00. (A. 122).

There was also evidence from which the jury could find that:

The 1972 invoices had as an address for Stephen Hathaway, Box 121, West Roxbury Post Office, West Roxbury, Massachusetts. (Ex. 4-7, A. 793-796). The record of that post office dating back to 1969 shows that Box 121 was not assigned to Stephen Hathaway and further, that ledger containing forwarding addresses did not contain any

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[2] Graham testified on five separate occasions as to the preparation of this 1972 schedule. On three of those occasions he said he had prepared it prior to his trip; twice he said that, upon the suggestion of IRS agent, Mr. Paul Deery, he could not have prepared it before. (A. 627-638).

address from Stephen Hathaway. (A. 512-514). The only connection with Box 121 and Stephen Hathaway was testimony that four or five years before a postal clerk remembered forwarding some mail to South Road in Deerfield, New Hampshire. (A. 514-541). The postmaster of Deerfield recalled receiving some mail for Hathaway between the years 1968-1971 and forwarding some mail to Biddeford, Maine. The postmaster at Biddeford, Maine had no way of telling whether or not Stephen Hathaway had even received mail there, as they kept no records, although Hathaway was listed as a patron of an RFD Route.

At the conclusion of the Government's case, the defendants filed motions for acquittal. (A. 850, 851). The Court reserved hearing and decision on the motions for acquittal.

On July 22, 1975, defendants' motion to require election by the United States or in lieu thereof for judgment of acquittal was heard and motion was denied. Requests for instructions were submitted and heard and various objections were taken by the Defendants. (A. 841-849).

On July 23, 1975, the jury received the Court's instructions. The Jury returned a verdict of guilty on each count as to each defendant. Defendants renewed their motions for judgment of acquittal.

Defendants seasonably filed motions for new trial. (A. 852-855). On July 29, 1975, a hearing was held on the reserved motions for judgment of acquittal and on the motions for new trial. Judge Murray denied the motions for acquittal on July 31, 1975. (A. 850, 851).

On August 26, 1975, the motions for new trial were denied and certain papers on the issue of authorization for the grant of immunity were impounded. (A. 858).

Each defendant filed a separate timely notice of appeal (A. 859, 862, 863), and subsequently filed a joint notice of appeal.

Judge Murray after hearing argument by counsel for the defendants and the Government, ordered the impounded papers relevant to the authorization request for immunities released for the sole purpose of review in preparation for this appeal. (A. 867). The Government and the Defendants stipulated to facts relating to that issue. (A. 865-867).

Proceedings Relating to Certain Immunity Grants

Prior to trial, the defendants filed motions seeking compliance by the Government with the District Court's Order of Discovery. (A. 15a, 15b). Following the Government's failure to comply (A. 32, 33), a hearing before Judge Murray on June 16, 1975 resulted in his ordering the compliance as set forth in his notice of June 23, 1975. (A. 34).

In response to Defendant Baptista's Motion for Divulgence of Grants of Immunity and Similar Actions by Governmental Authorities (A. 18, 19), the order of June 23, 1975, required the Government "to disclose the information, including copies of documents to the defendant not later than June 30, 1975." (A. 34). Despite the order of the Court, the Government failed to comply fully prior to trial. After the first day of trial, July 8, 1975, the Government produced so-called FBI 302 reports of investigation. In the prefatory statements as to several of the Meridian interviewees and grand jury witnesses, there was reference to an apparent understanding that such witnesses were not intended to be prosecuted. On July 9, 1975, the Government requested the Court for the first time to sign orders compelling the testimony of six of these individuals, Timothy McDonald, Carl Sinibaldi, Kenneth Cestari, Caesar Wheeler, Carol Nozka and Monica Seidlecki. (A. 7, 8). In the hearing on this request, the

Government for the first time produced a letter granting informal immunity to several of those witnesses. (A. 2-32, 2-33). The issue of the propriety of these grants of immunity, under the circumstances in which they were obtained, is set out more fully in Part II of the Brief. The objections raised by the defendants at trial (A. 170-175) and subsequently in the Motion for New Trial (A. 852-855) resulted in the impoundment by Judge Murray of one letter related to that issue. (A. 858). On September 29, 1975, following a post-trial hearing before Judge Murray, modification of the impoundment order was allowed. (A. 864). Stipulations between the Government and the defendants were agreed upon subsequent to that order. (A. 865-67).

Reasons for Granting the Writ

The reasons for this Court's granting the Writ of Certiorari will be separately advanced under each of the issues addressed below.

I. The Opinion of the Court of Appeals Is in Conflict With Decisions of This Court and There Is Conflict Between the Other Circuits on These Issues.

"The gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy." *United States* v. *Falcone,* 311 U.S. 205, 210 (1940). Therefore, in a conspiracy case, "the critical inquiry . . . involves a determination of the kind of agreement or understanding (that) existed as to each defendant . . . as he understood it." *United States* v. *Cirillo,* 468 F.2d 1233, 1235 (2nd Cir. 1972), *cert. denied*

410 U.S. 989 (1973); *United States* v. *Borelli*, 336 F.2d 376, 384 (2nd Cir. 1964), *cert. denied*, 379 U.S. 960 (1965).

In reviewing the sufficiency of the evidence a court must view the evidence in the light most favorable to the Government, giving the Government the benefit of all inferences which reasonably may be drawn. *E.g., Giragosian* v. *United States*, 349 F.2d 166 (1st Cir. 1965). The verdict of guilty can stand only if there is "substantial evidence from which a jury might fairly conclude guilt beyond a reasonable doubt." *Parker* v. *United States*, 379 F.2d 641, 644 (1st Cir. 1967). It is fundamental that a conviction for conspiracy must be supported by proof of an agreement to commit an offense. *See e.g., Ingram* v. *United States*, 360 U.S. 672, 677-8 (1969). Accordingly, an agreement between the defendants must be shown to have existed *at the very outset* i.e. that knowledge that a conspiracy exists at the time of its inception is the minimum requirement for showig a criminal act.

As stated in *Miller* v. *United States*, 382 F.2d 583, 587, (9th Cir. 1967), *cert. denied*, 390 U.S. 984, *rehearing denied*, 391 U.S. 971 (1968),

> In order to establish a person as a participant in a conspiracy, the evidence must show that the accused intended to join and cooperate in the illegal venture. Knowledge that a conspiracy exists is a minimum requirement for establishing the requisite intent.

Moreover, in order for the government to establish such intent, "the evidence of knowledge must be clear, not equivocal." *See Direct Sales Co.* v. *United States*, 319 U.S. 703, 711 (1943); *Miller* v. *United States, supra.* In the case at bar, as will be shown, the evidence of knowledge was far from clear and that any knowledge, if not unknown is certainly equivocal.

It is, of course, well settled that the existence of a conspiratorial agreement may and often must be proved through circumstantial evidence. *E.g., American Tobacco Co.* v. *United States,* 328 U.S. 781, 809 (1946). Nevertheless, the use of circumstantial evidence does not relieve the prosecution from the burden of building a case on other than mere suspicion and speculation. That is, "charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes." *Anderson* v. *United States,* 417 U.S. 211 (1974); *Ingram* v. *United States, supra* at 680; *Direct Sales, Co.* v. *United States, supra* at 711.

It is this "piling inference upon inference . . . to draw in all substantive crimes" contrary to *Anderson, supra* and *Ingram, supra* that the Court of Appeals is in conflict with this Court. This is clearly shown in the Court of Appeals decision at pages 68 and 69 wherein the court stated:

> "Hathaway paints himself as a shadowy figure, whom Graham never met or even knew existed. However, while there was some conflicting testimony as to his role,[16] we think the evidence supported a finding that he had knowingly and intentionally participated. Baptista furnished Graham with Hathaway's blank invoices, and Graham mailed checks made out to Hathaway, along with copies of the invoices, to Hathaway. Although none of the bank employees recalled cashing these specific checks, Hathaway was personally known to them, the checks were made payable to him, and his was the sole endorsement. It could be inferred that he alone cashed them. In addition,

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[16] "There was evidence that Hathaway was hospitalized when one of the 1972 checks was cashed, and that the checks were sent to his former residence where no mail reportedly came for him during the years in question."

> Baptista's secretary called the bank for Hathaway prior to his cashing checks. From these and related facts, the jury could conclude that there was no reasonable hypothesis but that Hathaway was a willing participant in Baptista's scheme."

Assuming Hathaway signed checks, this in and of itself could not show that an agreement to commit an illegal act existed. Arguably, the defendant Hathaway may be shown to be an aider and abettor. It is clear that to reach such a conclusion, namely that Hathaway conspired to commit an illegal act again results only from a piling of inference upon inference.

In reviewing the record, it is apparent that the proof is deficient with regard to showing any agreement between the defendants, during either year. This is all the more evident with respect to the necessity of proving an existing agreement on or about May, 1971, the alleged inception of the conspiracy. There has been no evidence, let alone unequivocal evidence, from which it can reasonably be inferred that the Defendant Hathaway at that point had intent to join or knowledge of a plan to violate the Hobbs and Travel Acts. This is especially clear in light of Graham's testimony that he had no communication with Hathaway and did not even know that Hathaway actually existed (A. 663). The Government would apparently rely heavily on testimony concerning the mailing of checks and invoices and cashing of checks as proof of such an agreement. Again, however, none of the testimony ever established a connected chain between Hathaway and illegal activities. Moreover, to infer an earlier agreement from those later activities would be to engage in nothing more than mere speculation.

Nor does testimony tending to show an association in friendship or occasional visits between Hathaway and

Baptista supply the proof that is lacking. Certainly, inference of guilt from mere association is a discredited principle. *See United States* v. *Addonizio*, 451 F.2d 49, 74 (3rd Cir.) *cert. denied*, 405 U.S. 936, *rehearing denied*, 405 U.S. 1048 (1972); *United States* v. *DeCavalcante*, 440 F.2d 1264 (3rd Cir. 1971); *Causey* v. *United States*, 352 F.2d 203 (5th Cir. 1965); *Evans* v. *United States*, 257 F.2d 121 (9th Cir.), *cert. denied*, 358 U.S. 866, *rehearing denied*, 358 U.S. 901 (1958). The Court of Appeals has long recognized the dangers inherent in relying on such evidence. As stated in *Reiss* v. *United States*, 324 F.2d 680, 685 (1st Cir. 1963), *cert. denied*, 376 U.S. 911 (1964), "Conspiracy cannot be established by mere 'inference no more valid than others equally supported by reason and experience.'"

In *United States* v. *Jit Sun Loo*, 478 F.2d 401, 407 (9th Cir. 1973), the court considered the record "void of substantial evidence that (defendant) conspired with anyone to import heroin into the United States . . ." in the face of evidence of two telephone calls to defendant from convicted co-defendants following their arrest, as well as a meeting with co-defendants at Kennedy Airport. The court found this to "only indicate at most a suspicion that (defendant) was implicated in the enterprise which is essentially devoid of any substantial foundation in fact to establish the elements necessary to show the existence of a conspiracy." 478 F.2d at 407.

In *Miller* v. *United States*, 382 F.2d 583 (9th Cir. 1976), *cert. denied*, 390 U.S. 984, *rehearing denied*, 391 U.S. 971 (1968), the court found evidence that defendant had gone to the home of a "known narcotics dealer", and that her auto had been used to make narcotic deliveries, insufficient to support a conspiracy conviction in the absence of evidence that she was aware of the reputation of the house or the actual use of her auto. It held that such acts did not

unequivocally point to her knowledge of the conspiracy or establish her intent to participate. The court stated:

> Association with an alleged co-conspirator may raise a strong suspicion of knowledge and intent, but this is not the only reasonable inference which may be drawn from such conduct. 382 F.2d at 587.

See also United States v. *Amato,* 495 F.2d 545, 549-550 (5th Cir. 1974), *cert. denied.*

In general, the Court of Appeals recognized in *Reiss* v. *United States, supra* at 685, that when Government "does no more than list a number of presumptively innocent actions, (u)nless such actions are in some way related so that they reflect upon each other, an accumulation of nothings is still nothing."

Again in apparent conflict with the 9th Circuit as well as the 5th Circuit and contrary to its own decision in the *Reiss* case, the Court of Appeals lists "a number of presumptively innocent actions", omits its own requirement that they be "in some way" related, points out the discrepancies in the testimony, and concludes that your Petitioner is a co-conspirator. This is clearly shown by the Court's opinion at pages 51, 52 and 53.

> "As before, these invoices were filled out and given to Meridian's accounting department to pay. Again, the managers of the projects to which the charges were billed testified that Stephen Hathaway was in no way involved. *Checks were made payable to Stephen Hathaway and sent to the address on the invoices, Box 121, West Roxbury Post Office, West Roxbury, Massachusetts.* (Emphasis supplied) The first check was sent to that address but was lost.[3] A re-

[3] No explanation was offered at trial as to how Meridian learned the check had been lost.

placement check and the remaining three checks were sent to the old Manchester address.

The records of the West Roxbury post office gave no indication of Box 121 ever having been assigned to Stephen Hathaway since 1969; nor was there any notation that any mail had been forwarded to Stephen Hathaway since 1969. However, the postal clerk in charge of box mail at that post office between 1970 and 1974 testified that he was personally familiar with the name Stephen Hathaway, although not the person, and recollected that Hathaway had been boxholder of Box 121. He also recalled having forwarded Hathaway's mail to South Road in Deerfield, New Hampshire, although the last time had been four or five years earlier. The postmaster of Deerfield testified that she knew Hathaway, that he had received mail there within the past six years, and that she had forwarded his mail to Biddeford, Maine, where Hathaway was listed as a postal patron. *However uncertain the chain of mail delivery, it was clearly established that all eight Meridian checks bore a single endorsement, the name Stephen Hathaway,* and that all were cashed at the Southeastern Bank in New Bedford.

The government declined the use of handwriting experts and therefore it is the Petitioner's belief that this "Uncertain chain" in the Court's opinion suggests speculation, conjecture and surmise. The Petitioner further asserts that it is this "Uncertain chain" that creates the reasonable doubt. The Court continues with:

> Hathaway had no account at that bank but he was known to the bank employees since he often cashed checks there, probably more than forty since 1969.

The bank allowed non-depositors to transact business there if they were first introduced by someone known to the bank. It was brought out that Hathaway had originally been introduced to Robert LeVesque, Senior Vice-President and Controller of the bank, by Baptista, a director and officer. LeVesque testified that Hathaway's normal routine when cashing checks there was to have Jackie McDonald, Baptista's secretary, first call ahead and tell the bank that he was coming over and to have the amount of the check ready for him. Hathaway cashed checks there ranging anywhere from $200 or $300 to $19,000.00 or $20,000.00. *Ms. McDonald testified that she did not do this only for Hathaway, but that she communicated with the bank quite often on behalf of various contractors and tenants of the Authority who were also non-depositors there.*

Francine Tavares, the head teller, testified that she had personally cashed two of the Meridian checks, identifying her stamp on them. She also identified Hathaway in the courtroom. *She recalled on one occasion seeing Hathaway speaking with Baptista in the bank lobby,* and she saw Baptista there a number of times.

Yet, she could not identify Stephen Hathaway as being the one who cashed checks.

Hathaway in fact never performed any work for the Authority. *There was no evidence of personal contact between Graham and Hathaway, and Graham testified he was not even certain that Hathaway existed until the investigation of the case was under way.*

Conclusion

In conclusion and in light of the above "uncertainties", your Petitioner contends that the decision of the Court of Appeals for the First Circuit affirming the Petitioner's conviction is contrary to its own prior decisions, as well as in conflict with decisions of this Court and decisions of the other Circuits. For these reasons, the Petitioner believes that the administration of the criminal law — both State and Federal — will be better served by a clear pronouncement from this Court, and respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals entered in this proceeding on March 24, 1976.

II. Were the Petitioner's Fifth Amendment Due Process Rights Abridged by (1) the Government's Failure To Comply With the District Court's Discovery Order; and (2) the Admission of Evidence Through Four Witnesses Immunized in Violation of 18 U.S.C. § 6003?

The Petitioner argues that his Fifth Amendment Due Process Rights were abrogated through the error of the trial judge in admitting evidence from four witnesses granted immunity in violation of 18 U.S.C. § 6003.

Given the unusual circumstances underlying the authorization and requests for immunity by the Government on the second day of trial the Petitioner seasonably objected to the issuance of immunity orders and renewed his objection in the motion for new trial. (A. 852-855).

The issue as to the summary manner in which these grants of immunity were obtained, comports with due process, and is an appropriate question which the Petitioner has standing to raise. Petitioner cites *Association of Data Processing* v. *Camp*, 397 U.S. 150 (1970), wherein

the court formulated a two-pronged standing test: if the litigant (1) has suffered injury-in-fact and if he (2) shows that the interest he seeks to protect is arguably within the zone of interests to be protected or regulated by the statutory guarantee, he has standing.

The trial judge issued discovery orders (A. 15a, 34) requiring *inter alia* the Government to disclose any information or documents wherein grants of immunity or similar promises or benefits to prospective witnesses were contained. The Government clearly violated these orders by withholding material covered by them.

The clear violation of the discovery order became apparent for the first time (A. 161-162) on the second day of trial when the Government produced a letter dated July 8, 1975, to Leonard Bucki, Esquire, counsel to the four Meridian employees, whose grants of immunity are the subject of this violation. The letter plainly promised that no prosecutions would result from any testimony given at trial. (A. 161-162). Clearly such promises of non-prosecution were purposefully withheld from the defense, in direct contravention of the District Court's discovery orders.

On July 9, 1975, the second day of trial, the Government requested a recess for the purpose of seeking authorization from the Department of Justice in Washington to request orders of immunity for Carl Sinibaldi, Timothy McDonald, Caesar Wheeler, Kenneth Cestari, Carol Nozka, and Monica Seidlecki.

Less than two hours later, the Government produced authorization for grants of immunity from Assistant Attorney General Richard L. Thornburgh. Mr. Thornburgh had been sworn into that position on the previous day. The Defendants objected to the summary manner in which this authorization was both requested and received. (A. 169, 174). The trial judge then ordered Assistant United States

Attorney Brooks to produce the request document signed by United States Attorney Gabriel, as required by 18 U.S.C. § 6003.[3]

The Government has admitted that contrary to the statements in the July 8, 1975 letter, the official forms USA-167 for requests of immunity were never forwarded to the Department of Justice. (A. 865).

The Petitioner believes that Assistant Attorney General Thornburgh was not apprised of the facts and circumstances necessary for the exercise of informed judgment required by 18 U.S.C. § 6003. Considering the unusual haste of the Government, the absence of the information usually included in Form USA-167, and the probable nonfamiliarity with his recently acquired position, there is substantial doubt that his approval was obtained in compliance with the requirements and intent of 18 U.S.C. § 6003.

(1) *Petitioner has suffered injury in fact.*

The Petitioner has undisputable standing to *raise this issue.* He and he alone is likely to be concerned with the loose immunizing of witnesses. A person who benefits from such practice by gaining immunity is unlikely ever to complain. The offending United States officials granting the immunity are estopped from raising the issue. Only the victim of such immunity grants has the interest requisite to call to a court's attention events such as are exposed in the present case. Such circumstances surely constitute

[3] The letter from U.S. Attorney Gabriel to Assistant Attorney General Thornburgh was impounded by order of Judge Murray. Defense counsel was allowed to review this letter after a special hearing was held before Judge Murray. (A. 864) The letter is not reproduced in the Appendix, per order of Judge Murray, but had been transmitted to the Court under seal.

"standing", unless violations and mockeries of law are to be unchallenged. Further, under the facts of this case, clear orders of a District Court relating to the divulgence of immunity information were violated. The Petitioner has standing to seek review of those violations.

Without the appearance of the witnesses improperly immunized in this case, crucial evidence both testimonial and documentary essential to the Government's case would be lacking. See, e.g., Ex. 4-21 (A. 793-809). The Government should not be allowed the fruits of its violations of Court orders and Congressional mandates. The convictions of the Petitioner under all counts are thus tainted by the questionable grants of immunity and as such are violation of the Petitioner's Due Process Rights.

(2) *Petitioner asserts that the interest he seeks to protect is arguably within zone of the interests to be protected.*

The statute purposely interposes the approval of the Attorney General or the specially designated senior official between the United States Attorney and the District Court prior to grants of immunity. It is the overall perspective of the official in a centralized role in the Justice Department which provides assurance of meaningful consideration.

Richard L. Thornburgh assumed his position no more than twenty-four hours before making these decisions. His determination could not have been made with the appropriate overall perspective when made in haste by a person in that role for the first day.

The legislative history of both 18 U.S.C. § 6003 and its predecessor 18 U.S.C. § 2514 [Appendix E] indicate a particular concern that immunity grants be issued by the courts only upon evidence of the exercise of informed judgment by both the U.S. Attorney and the senior official

in Washington. During Senate Hearings, Congressman Richard Poff, member of the National Commission on Reform of Federal Criminal Laws, testified as follows:

> "Is the public need for the particular testimony or documentary information in question so great as to override the social cost of granting immunity and thereby possibly pardoning a person who has violated the criminal law? *Such a calculation can be made only by a person familiar with the total range of law enforcement policies which would be affected by an immunity grant, and not by one familiar only with the asserted public need in the particular.*"[11]

[11] Senate hearings on S. 30, "Measures Relating to Organized Crime". Hearings before Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, 91st Congress, first session, March 18, 19, 25, 26; June 3, 4, 1969 pp. 287-312. See also Senate Report No. 91-617, December 18, 1969, and House Report 91-1188, June 15, 1970 for further legislative history.

The concern for the exercise of informed judgment by the responsible Department of Justice official is similar to the rationale of the Supreme Court's decision in *U. S.* v. *Giordano,* 416 U.S. 505 (1974).

In *Giordano,* the Court held that the pre-application approval for wiretaps could only be given by the officials designated in the statute. Because Congress specifically designated particular officials, the Court held that the "mature judgment of a particular responsible Department of Justice official is interposed as a critical precondition to any judicial order." *U.S.* v. *Giordano,* 94 S. Ct. at 1827.

The precise reasoning applied by the Court to 18 U.S.C. § 2516 must be accorded the immunity statute, § 2514, incorporated into the wiretap section with § 2516. In 1970, 18 U.S.C. § 6003 was passed to replace § 2514, but only

to change the nature of the statute from transactional to use immunity. Nowhere in the legislative history does the Congress modify the requirement of informed judgment by a senior Department of Justice official. Clearly, 18 U.S.C. § 6003 adopts that precondition to the fullest extent.

In light of the practices revealed in *Giordano,* wherein non-designated officials routinely perform these discretionary tasks, and in view of the probable lack of familiarity with his new position, the hasty approval of the grants of immunity without the necessary information does not meet the requirements of 18 U.S.C. § 6003.

The Court should not affirm the Government's position in violation of the clear requirements of the statute thereby giving the Government a "carte blanche" to avoid these requirements in future cases.

Conclusion

For the reasons stated, the Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit should be granted.

III. DID THE TRIAL COURT COMMIT ERROR AND THEREBY VIOLATE THE DUE PROCESS RIGHTS OF THE PETITIONER IN CHARGING THE JURY THAT THE PETITIONER COULD BE CONVICTED UNDER THE TRAVEL ACT UPON A FINDING OF MERE RECEIPT BY THE PETITIONER OF PAYMENTS VOLUNTARILY MADE BY THE PUTATIVE VICTIM GRAHAM THUS ALLOWING THE GOVERNMENT TO PROCEED ON INCONSISTENT THEORIES?

The government initially proceeded on a theory of extortion under the Hobbs Act, 18 U.S.C. § 1951. However, the Court's instructions to the jury under the Travel Act, 18 U.S.C. § 1952 allowed conviction on mere proof of

receipt by Baptista of payments voluntarily made by Graham. In giving such instructions, the jury was allowed to convict under the Travel Act for mere bribery and was not required to find extortion. The result of this was that the government was allowed to try its case on the six counts of the indictment using inconsistent proofs. The Petitioner seasonably moved to require election by the government. The trial court denied this motion.

Traditionally the essence of extortion is duress while that of bribery is voluntariness on the part of the person offering the bribe. *United States* v. *Addonizio,* 451 F.2d 49 (1972). While the jury was required to find that Baptista induced or coerced Graham to make the payments under the Hobbs Act, the jury was allowed to find these same payments were voluntarily made by Graham under the Travel Act. It is in this sense that the government's proofs are inconsistent. Regardless of the bribery and extortion, the heart of Petitioner's claim is that a singular transaction has been inconsistently characterized both as voluntary and as coerced or induced.

The Court of Appeals stated in its opinion that bribery and extortion are not mutually exclusive citing *United States* v. *Braasch,* 505 F.2d 139 (1974) and *United States* v. *Kahn,* 472 F.2d 272 in support of this contention. However, *Kahn* and *Braasch* present facual situations differing significantly from that of the instant case in which one individual, Hathaway, was found guilty of conspiracy to commit bribery and extortion in a singular transaction, and aiding and abetting in the commission of 18 U.S.C. § 1951 and § 1952 violations.

In *Braasch,* the petitioner claimed that his conduct was that of bribery and not extortion, and therefore he could not be convicted under the Hobbs' Act 18 U.S.C. § 1951, as it required proof of extortion. The Court responded by saying that for purposes of the Hobbs Act, that which

might constitute "classic bribery" could also be extortion. The Court nowhere intimated that the same individual could for the same act be convicted of both bribery and extortion. Moreover, the Court in *Kahn* said that if one individual could be found to have voluntarily made payments to a person charged with a violation of the Hobbs' Act, that such voluntariness could be evidence of lack of intent to commit extortion by the person charged under the Hobbs' Act. *Kahn* addressed the issue of whether bribery was a complete defense to a charge of extortion. Again the guilt of two individuals was involved.

The Petitioner is not complaining that the transaction should be classified as bribery or blackmail and not extortion, as in *United States* v. *Nardello*, 393 U.S. 286 (1969), but rather that the same payment cannot be found both to have been induced or coerced by the Petitioner to obtain a conviction under the Hobbs' Act and then transformed into a voluntary payment so that the government could obtain a conviction under the Travel Act on a theory of bribery.

As the trial court did not require election by the Government the Fifth Amendment due process rights of the Petitioner were violated.

IV. Did the Trial Judge Err in Instructing the Jury That Travel or Use of the Mails by a Non-defendant Putative Victim Was Sufficient Basis For Finding a Violation by the Petitioner of the Travel Act, 18 U.S.C. § 1952?

The Court of Appeals for the First Circuit decided issues in this case in direct contravention of the holding in *Rewis* v. *United States*, 401 U.S. 808 (1970) and the principles announced therein. The Petitioner was convicted for violations of the Travel Act, 18 U.S.C. § 1952 where there

was neither allegation in the indictment nor evidence in the record that he engaged in any interstate activity in furtherance of an unlawful purpose. The only evidence of interstate activity was that by the non-defendant putative victim. There was no evidence to show and no finding to establish that the victim was an agent or employee of the petitioner. Accordingly, the facts of this case raise directly the scope of the holding of this Court in *Rewis* v. *United States, supra*, where it was held that use of interstate facilities by non-defendant victims of an unlawful activity was not caused by the defendant. Should this Court find that its holding in *Rewis, supra,* does not dispose of this case, it is still appropriate for review. *Rewis* expressly reserved for a case properly presenting it, the question of the extent of encouragement required for finding that a defendant's conduct approximated the conduct of a principal in a criminal agency relationship sufficient to warrant application of the Travel Act. The Petitioner's is such a case.

An indispensable element of a prima facie case under the Travel Act, 18 U.S.C. § 1952, is interstate travel or use of interstate facility in furtherance of unlawful activity. The government conceded that it could not show that either of the Petitioners traveled or used any facility in interstate or foreign commerce. Instead, the government sought to ascribe to the Petitioners the travel of Thomas Graham, a non-defendant putative victim, to New Bedford and his mailing of checks to the defendant Hathaway in an attempt to supply the missing requisite interstate element of the offense. Although the Court of Appeals rejected the government's contentions regarding Graham's travel to New Bedford as unsupported by sufficient evidence of inducement it affirmed the Petitioners' Travel Act conviction under 18 U.S.C. § 2 by finding that the trial court's instruc-

tions to the jury comported with the standard announced in *Rewis* v. *United States, supra.* The Petitioners disagree.

Rewis reversed a conviction under the Travel Act where, as here, the only interstate activity was that of the victim; where, as here, the Petitioner could have reasonably foreseen interstate travel by victims; and where, as here, the victim was neither an employee nor an agent of the Petitioner. In so doing, this court stated that the legislative history of § 1952 strongly suggested that the Travel Act should not apply to criminal activity in such situations out of comity for the states.

The government argued in *Rewis* that where the owner of an illegal operation could foresee that customers would cross state lines, the interstate element was fulfilled. This Court rejected such an interpretation noting that there was little, if any, evidence that Congress intended foreseeability to govern criminal liability under § 1952. Regardless of this pronouncement, the Court of Appeals placed great reliance on foreseeability in finding the minimal activity of Petitioner in giving a few blank invoices of a company with a Massachusetts address to Graham in Massachusetts as sufficient evidence of causation or inducement to satisfy 18 U.S.C. § 1952 and 2. The Court of Appeals states Baptista, "knew that Meridian was a Pennsylvania-based company and that the address of the invoices was in Massachusetts." This is the sole finding of the Court of Appeals regarding a showing to support its contention that the Petitioner caused or induced the mailings. It is this reliance on foreseeability, denounced by this Court as an overly expansive construction of § 1952 as well as unintended by Congress to govern criminal liability under § 1952, upon which the Court of Appeals rests its decision. The effect of such a finding by the Court of Appeals is a total erasure of state lines.

Thus far this Court has recognized only one instance in which the interstate activities of one person can permissibly be attributed to another, the instance where an employer-employee or agency relationship is found to exist. *United States* v. *Chambers*, 382 F.2d 910; *United States* v. *Barrow*, 363 F.2d 62; *United States* v. *Zizzo*, 338 F.2d 577. The case at bar does not present such a situation as Graham was not found to be an employer or an agent of Hathaway. In fact the government stipulated that the only conspiracy that could be found in the case was between Hathaway and Baptista. Had Graham been an agent or employee of Baptista on the evidence presented, he surely would have been found to have conspired with the Petitioner. A stipulation that there could be no conspiracy between Graham and Baptista is evidence that there was no agreement between them. Since this case lacks such a relationship, the Court of Appeals and trial court have expanded the reach of the Travel Act to proportions beyond those authorized by this Court, or indeed, by Congress.

To the extent circumstances such as these have been considered by courts of appeals, see e.g., *United States* v. *DeCavalcante*, 440 F.2d 1264, and *United States* v. *Marquez*, 449 F.2d 89 (1971), the facts do not even remotely approach those in Petitioner's case. These are the only cases where the interstate activity of a victim was imputed to a person charged under the Travel Act who did not himself engage in interstate activity.

Marquez involved a victim who was an employee of the defendant. The facts of *Marquez*, therefore, place it squarely within the agent or employee exception to the general rule recognized by this Court in *Rewis*, that the defendant must have engaged in interstate activity.

In *DeCavalcante* the victims of an extortion scheme were forced to travel interstate to pay money to individuals who had previously robbed them at gunpoint. The inter-

state travel of the victims was attributed to the extorters under 18 U.S.C. § 2 (b) which requires one *willfully* to cause an act to be done. The Court stated that "use of the word 'causes' in the statute [18 U.S.C. § 2(b)] conveys an intent sufficiently broad to encompass not only voluntary acts of true agents, but also the involuntary acts of victims." The jury in the case at bar was not required to find nor was asked to find that the payments made by Graham were made involuntarily. The jury had to find only that Baptista caused or induced Graham to use the mails. The only evidence the jury had before them upon which they could find Baptista caused or induced Graham to use mails was evidence that Baptista gave Graham blank invoices of a Massachusetts company. However, there was no evidence that the mails were ever used or any mail delivered to Hathaway or anyone else. In addition, the jury merely had to find that the Petitioner caused or induced Graham to use the mails while § 2(b) requires a finding of willfully causing. Therefore the jury was allowed to convict on a less stringent standard than that required in § 2(b).

In *Rewis* v. *United States*, 401 U.S. 808 (1971), at page 815 the court held "active encouragement of interstate patronage violates the Act. Of course the conduct deemed to constitute active encouragement must be more than merely conducting the illegal operation."

As stated before the only connection with interstate commerce was the activity of Graham. On page 53, the Court of Appeals decision the court concluded that: "There was no evidence of personal contact between Graham and Hathaway, and Graham testified that he was not even certain that Hathaway existed until the investigation of the case was under way."

Both *Marquez* and *DeCavalcante* involved situations wherein a victim is threatened with death or bodily harm

by the defendant unless that victim did something ordered by the defendant. To understate the issue, such a situation most certainly "causes" a person to do something. To cite such cases as authority for the contention that the Petitioner's giving blank invoices to Graham "caused" Graham to mail something is unreasonable and inappropriate.

In addition, the facts of this case regarding Graham must be continuously borne in mind. Graham testified as set out *supra* that he had bribed four individuals in an amount exceeding $100,000.00 in return for contracts. Graham was no stranger to making payments such as those he made to Baptista. To say that the Petitioner caused or induced Graham to use the mails to make such payments sufficient for the Petitioner to have violated § 1952 defies the facts of this case.

This Court in *Rewis* conclusively rejected an expansive interpretation of the Travel Act as a broad interpretation would alter sensitive federal-state relationships. Additionally, as noted by other courts, the Legislative history of the Travel Act reveals that Congress passed the act in an attempt to aid state officials where criminal activity was carried on in one state by individuals residing and acting in another. The conviction of Petitioners, in the instant situation, offends traditional notions of comity of the states as here Massachusetts has not chosen to prosecute the Petitioners when it clearly could do so. This is particularly true where as in this case the federal nexus is so remote that the government must strain to find the required interstate element. There is no question in this case of Massachusets not being able to reach the activity of the Petitioners. Thus, there is no necessity for federal intrusion with respect to the Petitioners.

It is ironic that the Travel Act is here used to prosecute defendants whose sole activity was interstate through the use of a putative victim who and who alone was the

interstate traveler. Such an application of the Travel Act turns federal-state relationships on their heads and if fostered by this Court, will lead inevitably to an over-reliance by state prosecutors on the federal presence. The administration of the criminal law—both state and federal—will be better served by a clear pronouncement from this Court that local crimes should be prosecuted primarily locally.

Conclusion

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals entered in the proceeding on March 24, 1976.

Respectfully submitted,

C. Thomas Zinni
53 Mount Vernon Street
Boston, Massachusetts 02108
(617) 523-3245

Of Counsel:
Michael W. Pessia
Richard E. Wood

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 75-1352

UNITED STATES OF AMERICA,
APPELLEE,
v.
STEPHEN HATHAWAY,
DEFENDANT, APPELLANT,

DOCKET ENTRIES

1975

Sept. 18 Record on appeal in one volume and one supplement consisting of one box filed and case docketed.

22 Supplement to record on appeal consisting of one document filed.

29 Appearance of C. Thomas Zinni for appellant filed.

Oct. 15 Motion filed. Order (Coffin, Ch.J.) granting leave to Blanchard Press, Inc. to withdraw for the purpose of reproduction certain exhibits. Notices mailed. Notice of joint appeal filed.

16 Supplement to record on appeal consisting of seven volumes of transcript filed.

17 Stipulation re: Thornberg filed. Stipulation relating to impounded Material filed.

22 Motion, assented to, filed. Order (Coffin, Ch.J.) granting leave to appellants to file a consolidated brief not in excess of 82 pages and enlarging time for filing brief for appellants to October 28, 1975. Notices mailed.

29 Joint brief for appellants filed and appendix.

1975

Nov. 10 Motion filed. Order (Coffin, Ch.J.) enlarging time for filing brief for appellee to November 24, 1975, and granting leave to appellee to file a brief not in excess of 82 pages. Notices mailed.

24 Brief for appellee filed.

Dec. 1 Supplement to record on appeal consisting of impounded document filed.

2 Appearance of Steven J. Brooks, filed for appellee.

1976

Mar. 24 JUDGMENT; The judgment of the district court is affirmed. Opinion of the court by Campbell, J. Notices mailed.

Apr. 14 Mandate issued, copy filed and original papers returned to the district court. Notices mailed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA
v.
HOWARD J. BAPTISTA and
STEPHEN P. HATHAWAY

INDICTMENT

The grand jury charges:

COUNT I

1. At all times mentioned in this indictment, the defendant, HOWARD J. BAPTISTA, of New Bedford, Massachusetts, was Executive Director of the New Bedford Redevelopment Authority for the City of New Bedford, in the Commonwealth and District of Massachusetts.

2. At all times mentioned in this indictment, the defendant, STEPHEN P. HATHAWAY, of Biddeford, Maine, was sole proprietor of Stephen Hathaway Construction Materials Suppliers Company, of West Roxbury and Manchester, Massachusetts.

3. At all times mentioned in this indictment, the New Bedford Redevelopment Authority was a body corporate and politic, established and exercising public and essential governmental functions pursuant to the provisions of Massachusetts General Laws, Annotated, Chapter 121(B), subsection 4.

4. At all times mentioned in this indictment, the New Bedford Redevelopment Authority had the responsibility of assisting the City of New Bedford in the area of urban renewal projects, which projects necessitated negotiating and contracting with engineering and building contractors to accomplish the urban renewal needs of the City of New Bedford.

5. At all times mentioned in this indictment, Thomas A. Graham, of Gwinedd Valley, Pennsylvania, was Chairman of the Board and Chief Executive Officer of Meridian Engineering, Incorporated, of Philadelphia, Pennsylvania, a corporation organized and incorporated under the laws of the Commonwealth of Pennsylvania, doing business in the states of Pennsylvania, New Jersey, New York, Massachusetts, and elsewhere, and engaging in the supply of engineering services for various building projects throughout the United States, which services were themselves dependent upon interstate commerce for materials, supplies and labor.

6. From on or about May, 1971 to on or about December, 1972, the exact dates being to the grand jury unknown, at New Bedford, in the Commonwealth and District of Massachusetts, and elsewhere, the defendants,

HOWARD J. BAPTISTA
STEPHEN P. HATHAWAY

did knowingly, wilfully and unlawfully combine, conspire and agree together with each other and other persons to the grand jury unknown to commit offenses against the United States in violation of Title 18, United States Code, Sections 1951 and 2, in that the defendants did knowingly and unlawfully combine, conspire, and agree together to obstruct, delay and affect interstate commerce as that term is defined in Title 18, United States Code, Section 1951, and did attempt to do so, and did so, by extortion, that is to say, by obtaining money from Thomas A. Graham and Meridian Engineering, Inc. for approval, by the New Bedford Redevelopment Authority, of Meridian Engineering, Inc. to supply engineering and planning services on urban renewal projects within the City of New Bedford, with the consent of Thomas A. Graham and Meridian Engineering, Inc., induced by the wrongful use of fear and under the color of official right.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants committed, or caused the commission of, the following overt acts:

1. On or about June, 1971 Thomas A. Graham travelled to New Bedford, Massachusetts to meet with the defendant, HOWARD J. BAPTISTA.

2. On or about June, 1971 the defendant, HOWARD J. BAPTISTA, gave to Thomas A. Graham blank invoices of the Stephen Hathaway Construction Materials Suppliers Company.

3. On or about July, 1971, the defendants caused Thomas A. Graham and Meridian Engineering, Inc. to send a check for $8,327 from Philadelphia to the defendant, STEPHEN HATHAWAY, made payable to Stephen Hathaway.

4. On or about August, 1971, the defendants caused Thomas A. Graham and Meridian Engineering, Inc. to send a check for $962.00 from Philadelphia to the defendant, STEPHEN HATHAWAY, made payable to Stephen Hathaway.

5. On or about July, 1972, Thomas A. Graham travelled to New Bedford, Massachusetts to meet with the defendant, HOWARD J. BAPTISTA.

6. On or about July, 1972, the defendant, HOWARD J. BAPTISTA, gave Thomas A. Graham blank invoices of the Stephen Hathaway Construction Materials and Suppliers Company.

7. On or about September, 1972, the defendants caused Thomas A. Graham and Meridian Engineering, Inc. to send a check for $1,352 to the defendant, STEPHEN HATHAWAY, made payable to Stephen Hathaway.

All in violation of Title 18, United States Code, Section 1951.

The grand jury charges:

COUNT II

1. Paragraphs 1, 2, 3, and 4 of Count I are hereby realleged and incorporated as though set forth in full herein.

2. At all times mentioned in this indictment, Thomas A. Graham, of Gwinedd Valley, Pennsylvania, was Chairman of the Board and Chief Executive Officer of Meridian Engineering, Inc., of Philadelphia, Pennsylvania, a corporation organized and incorporated under the laws of the Commonwealth of Pennsylvania, doing business in the states of Pennsylvania, New Jersey, New York, Massachusetts, and elsewhere, and engaging in the supply of engineering services for various building projects throughout the United States, which services were themselves dependent upon interstate commerce for materials, supplies and labor.

3. From on or about May, 1971 to on or about December, 1972, the exact dates being to the grand jury unknown, at New Bedford, in the Commonwealth and District of Massachusetts, and elsewhere, the defendants

HOWARD J. BAPTISTA
STEPHEN P. HATHAWAY

did knowingly, wilfully and unlawfully combine, conspire and agree together with each other and other persons to the grand jury unknown to commit certain offenses against the United States, to wit, violation of Title 18, United States Code, Sections 1952 and 2, within the Commonwealths and Districts of Massachusetts and Pennsylvania, in that the defendants did wilfully cause others to travel in interstate commerce, and to cause others to utilize the facilities in interstate commerce, to promote, manage, establish and carry on, and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the solicitation, agreement to

receive, and receipt of money from Thomas A. Graham and Meridian Engineering, Inc., in return for a contract for engineering services with the New Bedford Redevelopment Authority, in violation of the laws of the Commonwealth of Massachusetts and the United States, and it was further part of said conspiracy that the defendants would thereafter perform and cause others to perform acts of promoting said unlawful activity and acts facilitating the promotion of said unlawful activity.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof the defendants caused the commission of the following overt acts:

1. On or about June, 1971 Thomas A. Graham used interstate facilities to travel from Philadelphia, Pennsylvania to New Bedford, Massachusetts to meet with the defendant, HOWARD J. BAPTISTA.

2. On or about July, 1971 Thomas A. Graham and Meridian Engineering, Inc. utilized interstate facilities by mailing from Philadelphia, Pennsylvania a check in the amount of $8,327 to STEPHEN HATHAWAY in Manchester, Massachusetts.

3. On or about July, 1972, Thomas A. Graham used interstate facilities to travel from Philadelphia, Pennsylvania, to New Bedford, Massachusetts to meet with the defendant, HOWARD J. BAPTISTA.

4. On or about October, 1972 Thomas A. Graham and Meridian Engineering, Inc. utilized interstate facilities by mailing from Philadelphia, Pennsylvania a check in the amount of $1,840.00 to STEPHEN P. HATHAWAY and HOWARD J. BAPTISTA.

All in violation of Title 18, United States Code, Section 371.

The grand jury charges:

COUNT III

1. Paragraphs 1, 2, 3, and 4 of Count I are hereby realleged and incorporated as though set forth in full herein.

2. At all times mentioned in this indictment, Thomas A. Graham, of Gwinedd Valley, Pennsylvania, was Chairman of the Board and Chief Executive Officer of Meridian Engineering, Inc., of Philadelphia, Pennsylvania, a corporation organized and incorporated under the laws of the Commonwealth of Pennsylvania, doing business in the states of Pennsylvania, New Jersey, New York, Massachusetts, and elsewhere, and engaging in the supply of engineering services for various building projects throughout the United States, which services were themselves dependent upon interstate commerce for materials, supplies and labor.

3. From on or about June, 1971 to on or about November, 1971, in the Commonwealth and District of Massachusetts, and elsewhere, the defendants,

HOWARD J. BAPTISTA
STEPHEN P. HATHAWAY

and other diverse persons to the grand jury unknown, did knowingly, willfully and unlawfully attempt to obstruct, delay and affect interstate commerce and the movement of materials, equipment, services and supplies in such commerce by extortion, in that the defendants, HOWARD J. BAPTISTA and STEPHEN P. HATHAWAY, obtained a sum of money in the amount of approximately Twenty-Five Thousand Dollars ($25,000) from Thomas A. Graham and Meridian Engineering, Inc., induced both by the wrongful use of fear and under the color of official right, in that the defendants, HOWARD J. BAPTISTA and STEPHEN P. HATHAWAY, acting in concert, and other persons to the grand jury unknown, did demand, solicit and obtain from Thomas A. Graham and Meridian Engineering, Inc. money

in the amount of approximately Twenty-Five Thousand Dollars ($25,000), which said sum of money was paid to prevent economic loss due to the fact that Thomas A. Graham and Meridian Engineering, Inc. could not obtain, without paying said sum of money, engineering and planning contracts with the New Bedford Redevelopment Authority.

All in violation of Title 18, U.S. Code, Sections 1951 and 2.

The grand jury charges:

COUNT IV

1. Paragraphs 1, 2, 3, and 4 of Count I are hereby realleged and incorporated as though set forth in full herein.

2. At all times mentioned in this indictment, Thomas A. Graham, of Gwinedd Valley, Pennsylvania, was Chairman of the Board and Chief Executive Officer of Meridian Engineering, Inc., of Philadelphia, Pennsylvania, a corporation organized and incorporated under the laws of the Commonwealth of Pennsylvania, doing business in the states of Pennsylvania, New Jersey, New York, Massachusetts, and elsewhere, and engaging in the supply of engineering services for various building projects throughout the United States, which services were themselves dependent upon interstate commerce for materials, supplies and labor.

3. From on or about June, 1971 to on or about October, 1971, the exact dates being to the grand jury unknown, in the Commonwealth and District of Massachusetts, and elsewhere, the defendants herein,

HOWARD J. BAPTISTA
STEPHEN P. HATHAWAY

did knownigly, willfully and unlawfully, and in furtherance of the plan and purpose to commit the offenses charged in Counts I and III of this indictment, did cause Thomas A.

Graham to travel in interstate commerce between Philadelphia, Pennsylvania, and New Bedford, Massachusetts, and to use a facility in interstate commerce, namely, the United States mails, by mailing Meridian Engineering, Inc.'s checks from Philadelphia, Pennsylvania, to the defendant, STEPHEN P. HATHAWAY'S mailing address at Manchester in the Commonwealth of Massachusetts, with the intent to promote, manage, establish, carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the solcitation, agreement to receive, and receipt of money from Thomas A. Graham and Meridian Engineering, Inc., in violation of the laws of the Commonwealth of Massachusetts and the laws of the United States of America, said unlawful activity pertaining to the obtaining of an engineering contract by Thomas A. Graham and Meridian Engineering, Inc. with the New Bedford Redevelopment Authority, and that the defendants herein did thereafter perform and attempt to perform the acts of promoting, managing, establishing and carrying on of the said unlawful activity, in that the defendants did obtain a sum of money in an amount of approximately Twenty-Five Thousand Dollars ($25,000), from Thomas A. Graham and Meridian Engineering, Inc.

All in violation of Title 18, United States Code, Sections 1952 and 2.

The grand jury charges:

COUNT V

1. Paragraphs 1, 2, 3, and 4 of Count I are hereby realleged and incorporated as though set forth in full herein.

2. At all times mentioned in this indictment, Thomas A. Graham, of Gwinedd Valley, Pennsylvania, was Chairman of the Board and Chief Executive Officer of Meridian Engineering, Inc., of Philadelphia, Pennsylvania, a cor-

poration organized and incorporated under the laws of the Commonwealth of Pennsylvania, doing business in the states of Pennsylvania, New Jersey, New York, Massachusetts, and elsewhere, and engaging in the supply of engineering services for various building projects throughout the United States, which services were themselves dependent upon interstate commerce for materials, supplies and labor.

3. From on or about July, 1972 to on or about December, 1972, in the Commonwealth and District of Massachusetts, and elsewhere, the defendants,

HOWARD J. BAPTISTA
STEPHEN P. HATHAWAY

and other diverse persons to the grand jury unknown, did knowingly, willfully, and unlawfully attempt to obstruct, delay and affect interstate commerce and the movement of materials, equipment, services and supplies in such commerce by extortion, in that the defendants, HOWARD J. BAPTISTA and STEPHEN P. HATHAWAY, obtained a sum of money in the amount of approximately Five Thousand Dollars ($5,000) from Thomas A. Graham and Meridian Engineering, Inc., induced both by the wrongful use of fear and under the color of official right, in that the defendants, HOWARD J. BAPTISTA and STEPHEN P. HATHAWAY, acting in concert, and other persons to the grand jury unknown, did demand, solicit and obtain from Thomas A. Graham and Meridian Engineering, Inc., a sum of money in the amount of approximately Five Thousand Dollars ($5,000), which said sum of money was paid to prevent economic loss due to the fact that Thomas A. Graham and Meridian Engineering, Inc. could not obtain, without paying said sum of money, engineering and planning contracts with the New Bedford Redevelopment Authority.

All in violation of Title 18, United States Code, Sections 1951 and 2.

The grand jury charges:

COUNT VI

1. Paragraphs 1, 2, 3, and 4 of Count I are hereby realleged and incorporated as though set forth in full herein.

2. At all times mentioned in this indictment, Thomas A. Graham, of Gwinedd Valley, Pennsylvania, was Chairman of the Board and Chief Executive Officer of Meridian Engineering, Inc., of Philadelphia, Pennsylvania, a corporation organized and incorporated under the laws of the Commonwealth of Pennsylvania, doing business in the states of Pennsylvania, New Jersey, New York, Massachusetts, and elsewhere, and engaging in the supply of engineering services for various building projects throughout the United States, which services were themselves dependent upon interstate commerce for materials, supplies and labor.

3. From on or about July, 1972 to on or about December, 1972, in the Commonwealth and District of Massachusetts, and elsewhere, the defendants,

HOWARD J. BAPTISTA
STEPHEN P. HATHAWAY

and other diverse persons to the grand jury unknown, did knowingly, willfully, and unlawfully, and in furtherance of the plan and purpose to commit the offenses charged in Counts I and V of this indictment, did cause Thomas A. Graham to travel in interstate commerce between Philadelphia, Pennsylvania and New Bedford, Massachusetts, and to use a facility in interstate commerce, namely, the United States mails, by mailing Meridian Engineering, Inc.'s checks from Philadelphia, Pennsylvania, to the defendants, STEPHEN P. HATHAWAY and HOWARD J. BAPTISTA, in the Commonwealth of Massachusetts, with the intent to promote, manage, establish, carry on and facilitate the promoting, managing, establishing, and carrying on of an

unlawful activity, said unlawful activity being the solicitation, agreement to receive, and receipt of money from Thomas A. Graham and Meridian Engineering, Inc., in violation of the laws of the Commonwealth of Massachusetts and the laws of the United States of America, said unlawful activity pertaining to the obtaining of an engineering contract by Thomas A. Graham and Meridian Engineering, Inc. with the New Bedford Redevelopment Authority, and that the defendants herein did thereafter perform and attempt to perform the acts of promoting, managing, establishing, and carrying on of the said unlawful activity, in that the defendants did obtain a sum of money in an amount of approximately Five Thousand Dollars ($5,000) from Thomas A. Graham and Meridian Engineering, Inc.

All in violation of Title 18, United States Code, Sections 1952 and 2.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 75-140-M

UNITED STATES OF AMERICA

v.

STEPHEN P. HATHAWAY

JUDGMENT AND COMMITMENT

On this 11th day of September, 1975 came the attorney for the government and the defendant appeared in person and by C. Thomas Zinni, counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and verdicts of guilty has been convicted of the offense of knowingly, wilfully and unlawfully combining, conspiring, and agreeing with others to commit offenses against the United States in that he did agree with others to obstruct, delay and affect interstate commerce and did do so by extorting money which was induced by the wrongful use of fear and under color of official right, in violation of 18 U.S.C. 1951, as charged in count I; conspiring with others to cause others to travel in interstate commerce and to utilize the facilities in interstate commerce to carry on an unlawful activity, in violation of 18 U.S.C. 371, as charged in count II; knowingly, wilfully and unlawfully attempting to obstruct, delay and affect interstate commerce by extortion induced by the wrongful use of fear and under color of official right, in violation of 18 U.S.C. 1951 and 2, as charged in counts III and V; knowingly, wilfully and unlawfully causing others to travel in interstate commerce and to utilize the facilities in interstate commerce to carry on an unlawful activity, in violation of 18 U.S.C. 1952 and 2, as charged in counts IV and VI and the court having

asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years, the first four (4) months to be served in a jail-type institution, the balance suspended and defendant placed on probation for a period of twenty (20) months, and defendant ordered to pay a fine in the amount of $2,000 on each count, for a total of $12,000.00.

IT IS ADJUDGED that the execution of the sentence is stayed pending appeal.

(s) FRANK J. MURRAY
United States District Judge

I hereby attest and certify, on Sept. 12, 1975, that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

GEORGE F. McGRATH
Clerk, U.S. District Court
District of Massachusetts
BY: (s) ANN DOHERTY, *Deputy*

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 75-1352

UNITED STATES OF AMERICA,

APPELLEE,

v.

STEPHEN HATHAWAY,

DEFENDANT, APPELLANT.

No. 75-1353

UNITED STATES OF AMERICA,

APPELLEE,

v.

HOWARD BAPTISTA,

DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Frank J. Murray, U.S. District Judge]

Before COFFIN, *Chief Judge,*
McENTEE and CAMPBELL, *Circuit Judges.*

C. Thomas Zinni and *Morris M. Goldings,* with whom *Corinne Gehr* and *Alan Rindler* were on brief, for appellants.

Steven J. Brooks, Assistant United States Attorney, with whom *James N. Gabriel,* United States Attorney, *Edward J. Lee, Kevin J. O'Dea,* and *Alan D. Rose,* Assistant United States Attorneys, were on brief, for appellee.

March 24, 1976

CAMPBELL, *Circuit Judge.* Defendants Hathaway and

Baptista were charged in a six-count indictment with substantive and conspiracy violations of 18 U.S.C. § 1951, the Hobbs Act, and 18 U.S.C. § 1952, the Travel Act. Both were convicted of all charges after an eight-day jury trial.

The Government contended that defendants extorted money from Meridian Engineering, Inc. (Meridian), in return for the award of two contracts by the New Bedford, Massachusetts, Redevelopment Authority (Authority), of which Baptista was Executive Director. Meridian was a design, engineering, and construction management firm with its principal office in Philadelphia, Pennsylvania. In the summer of 1971, the Authority awarded Meridian a no-bid contract for the West End Urban Redevelopment Project (WEP), and in the summer of 1972 it awarded Meridian a contract for the Neighborhood Development Project (NDP). Both of those contracts were allegedly arranged at meetings between Baptista and Thomas A. Graham, the President of Meridian.

Graham, testifying under a grant of immunity, 18 U.S.C. § 6003, was the Government's chief witness. He testified that Meridian first came in contact with the Authority in early 1971, when Meridian worked on WEP as a subcontractor for the project consultant, Lucas & Edwards, Inc., a New York planning firm. Meridian became interested in doing its own engineering and design work for the Authority as a "follow-on" to the planning services performed by Lucas & Edwards, Inc. Graham therefore met with William Lucas of Lucas & Edwards, Inc., to discuss a WEP contract for Meridian. From Lucas, Graham gained the impression that to procure a WEP contract for Meridian, he would have to pay a sum of money to Baptista, whom he had never met. A meeting of Graham, Lucas and Baptista was arranged, and Graham and Lucas flew to New Bedford.

At the meeting, the topics of discussion were the WEP contract and the payment of money by Meridian to Baptista for that contract. Graham testified that he proposed the sum of $25,000, slightly in excess of 10% of the contract amount, and that Baptista agreed to it. Prior to the meeting, Graham had drawn up a schedule for the payments, which would number four, laying out four payment dates, the amounts to be paid to Baptista on each date, and a Meridian project to which the amounts would be charged. Baptista gave Graham four blank invoices, bearing Hathaway's letterhead, for the purpose of charging and covering up these payments.

During the meeting, Baptista mentioned another Authority project, the NDP. He told Graham that the contract would be coming up in the following year and that he was interested in Meridian doing a good job on WEP so that it could be considered for the later project.

Graham testified that he agreed to make the payments because otherwise Meridian would not have received the WEP contract.

After returning to Philadelphia, Graham caused the blank Hathaway invoices[1] to be filled in with Meridian's address, a statement of work "performed", i.e. labor, materials, or equipment that Hathaway allegedly furnished, and the amount due. The amounts were charged against other Meridian jobs. The project managers for each of those jobs testified that no Stephen Hathaway supplied any materials or did any work on those jobs. The invoices and the schedule which Graham had drawn up were given to Meridian's comptroller, who placed them in a cash flow file with instructions to mail the checks on the dates noted and to file the entries against the invoices. In all, four checks were made out to Stephen Hathaway pursuant to

[1] The original invoices were not offered at trial as they could not be located in Meridian's files.

the invoices and were signed by Carl Sinibaldi, the head of Meridian's accounting department and Graham's brother-in-law. The company practice was to enclose copies of invoices with all checks. It was testified that the checks were then sent to 59 Raymond Street in Manchester, Massachusetts, the address on the invoices, although Margaret R. Hathaway, who resided at that address during 1971 and 1972, herself testified that Stephen Hathaway had left that residence permanently in 1964, and that no mail had come for him there since 1970.

Graham testified that he saw Baptista again in July, 1971, at Baptista's office, and asked if the first check had been received and if the procedure being used was satisfactory. Baptista stated that it was and that he had received the first payment.

Work was begun on the project even before the contract was actually signed. Graham testified that although it was very rare to begin so early, Meridian went ahead as he had received a letter of assurance from Baptista that Meridian would be awarded the contract at the next board meeting. The Authority did in fact award the contract to Meridian at that board meeting in August, 1971.

The following summer, in early August, 1972, Graham again met with Baptista at his Authority office in New Bedford to discuss the NDP contract. This meeting was arranged by either Graham or one of his staff, not by Baptista. Graham testified that before leaving Philadelphia he prepared a schedule similar to the one used in 1971.[2] At the meeting, according to Graham's testimony, he told Baptista that he had learned from Caesar Wheeler, Meridian's WEP project manager, that Meridian was not going to receive the NDP contract. Baptista replied that

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[2] Graham testified about this scheduled on five separate occasions. Three times he said that he prepared it prior to his trip, and twice, upon the suggestion of an Internal Revenue Service agent, that he could not have prepared it before.

he was under local pressure to award the contract to a local firm. Graham suggested that they work out an arrangement as before and offered $5,000, using the same procedure. Baptista replied that he thought he could swing the contract for Meridian, and that $5,000 would be satisfactory. Graham asked for another set of blank invoices, and Baptista gave him some more with Hathaway's letterhead. Graham showed Baptista the schedule he had prepared, listing four payments totalling $5,000 and the projects to which the amounts would be charged. Graham testified that he again agreed to pay the money since he believed that Meridian would not receive the contract otherwise. The Authority approved Meridian for the NDP engineering work in September, 1972.

As before, these invoices were filled out and given to Meridian's accounting department to pay. Again, the managers of the projects to which the charges were billed testified that Stephen Hathaway was in no way involved. Checks were made payable to Stephen Hathaway and sent to the address on the invoices, Box 121, West Roxbury Post Office, West Roxbury, Massachusetts. The first check was sent to that address but was lost.[3] A replacement check and the remaining three checks were sent to the old Manchester address.

The records of the West Roxbury post office gave no indication of Box 121 ever having been assigned to Stephen Hathaway since 1969; nor was there any notation that any mail had been forwarded to Stephen Hathaway since 1969. However, the postal clerk in charge of box mail at that post office between 1970 and 1974 testified that he was personally familiar with the name Stephen Hathaway, although not the person, and recollected that Hathaway had been boxholder of Box 121. He also recalled having

[3] No explanation was offered at trial as to how Meridian learned the check had been lost.

forwarded Hathaway's mail to South Road in Deerfield, New Hampshire, although the last time had been four or five years earlier. The postmaster of Deerfield testified that she knew Hathaway, that he had received mail there within the past six years, and that she had forwarded his mail to Biddeford, Maine, where Hathaway was listed as a postal patron.

However uncertain the chain of mail delivery, it was clearly established that all eight Meridian checks bore a single endorsement, the name Stephen Hathaway, and that all were cashed at the Southeastern Bank in New Bedford. Hathaway had no account at that bank but he was known to the bank employees since he often cashed checks there, probably more than forty since 1969. The bank allowed non-depositors to transact business there if they were first introduced by someone known to the bank. It was brought out that Hathaway had originally been introduced to Robert LeVesque, Senior Vice-President and Controller of the bank, by Baptista, a director and officer. LeVesque testified that Hathaway's normal routine when cashing checks there was to have Jackie McDonald, Baptista's secretary, first call ahead and tell the bank that he was coming over and to have the amount of the check ready for him. Hathaway cashed checks there ranging anywhere from $200 or $300 to $19,000 or $20,000. Ms. McDonald testified that she did not do this only for Hathaway, but that she communicated with the bank quite often on behalf of various contractors and tenants of the Authority who were also non-depositors there.

Francine Tavares, the head teller, testified that she had personally cashed two of the Meridian checks, identifying her stamp on them. She also identified Hathaway in the courtroom. She recalled on one occasion seeing Hathaway speaking with Baptista in the bank lobby, and she saw Baptista there a number of times.

Hathaway in fact never performed any work for the Authority. There was no evidence of personal contact between Graham and Hathaway, and Graham testified he was not even certain that Hathaway existed until the investigation of the case was under way.

I.

Defendants first raise a number of objections to their Hobbs Act convictions. The Hobbs Act, 18 U.S.C. § 1951, provides in pertinent part:

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> . . . . .
>
> (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term 'commerce' means . . . all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

Defendants were charged under this section with willfully

attempting to obstruct, delay and affect interstate commerce and the movement of materials, equipment, services and supplies in such commerce by extortion, induced both by the wrongful use of fear of economic loss and under the color of official right.[4] Their present challenges have to do

> "From on or about June, 1971 to on or about November, 1971 . . . [defendants] did knowingly, willfully and unlawfully attempt to obstruct, delay and affect interstate commerce and the movement of materials, equipment, services and supplies in such commerce by extortion, in that the defendants . . . obtained a sum of money in the amount of approximately Twenty-five Thousand Dollars ($25,000) from Thomas A. Graham and Meridian Engineering, Inc., induced both by the wrongful use of fear and under the color of official right, in that the defendants, acting in concert, . . . did demand, solicit and obtain from Thomas A. Graham and Meridian Engineering, Inc. money in the amount of approximately Twenty-five Thousand Dollars ($25,000), which said sum of money was paid to prevent economic loss due to the fact that Thomas A. Graham and Meridian Engineering, Inc. could not obtain, without paying said sum of money, engineering and planning contracts with the said New Bedford Redevelopment Authority."

The other Hobbs Act count, Count V, relating to the alleged extortion of $5,000 for a contract in 1972, was similarly worded.

with the meaning of "extortion", the meaning of "commerce", and the sufficiency of the evidence on various elements of the Government's case.

Defendants contend that the district court incorrectly instructed the jury as to the meaning of extortion under the Hobbs Act,[5] quoting as follows from the court's charge:

> "The term 'extortion' means obtaining of property from another with his consent induced under color of official right. It is an alternative method. It is the second string to the government's bow. The term extortion under the statute includes the obtaining from

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[4] Count III reads in pertinent part,

[5] In construing the Hobbs Act, we have in mind the Supreme Court's admonition that Congress, in enacting the statute, intended to "use all the constitutional power [it] has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960).

> another induced under color of official right. The government is entitled to prove the element of extortion in the crimes charged in Counts 3 and 5 [Hobbs Act violations] either by proving extortion of money induced by fear of economic loss, or extortion of money induced under color of official right. The government is not required to prove both by fear and under color of official right."

Defendants argue that actual or threatened force, violence or fear are necessary elements of extortion in all Hobbs Act cases, even those involving the obtaining of property under color of official right. They rely upon what they say is the traditional distinction between bribery and extortion, bribery involving voluntary payment by the victim, and extortion payment under duress. *United States* v. *Addonizio*, 451 F.2d 49, 72 (3rd Cir.), *cert. denied,* 405 U.S. 936 (1972).

However, we find no reason to part company with the other circuits which have considered this question, all of which have read the statute as did the court below. *United States* v. *Trotta*, 525 F.2d 1096, 1100 (2d Cir. 1975), *petition for cert. filed,* 44 U.S.L.W. 3505 (U.S., Jan. 21, 1976) (No. 75-1032); *United States* v. *Braasch*, 505 F.2d 139, 151 & n.8 (7th Cir. 1974) (Clark, J.), *cert. denied,* 421 U.S. 910 (1975); *United States* v. *Kenny,* 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972); *cf. United States* v. *Price,* 507 F.2d 1349 (4th Cir. 1974). The statute is clearly phrased in the disjunctive: "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, *or* under color of official right." § 1951(b)(2) [Emphasis supplied]. Further, a disjunctive reading comports with the historical development of the crime of extortion. The "under color of official right" language reflects the common law definition of extortion, which could be committed only

by a public official's corrupt taking of a fee under color of his office and did not require proof of threat, fear, or duress. *United States* v. *Staszcuk*, 517 F.2d 53 (7th Cir. 1974) (en banc) (Stevens, J.) (adopting by reference the panel opinion at 502 F.2d 875, 878 on this point), *cert. denied*, 44 U.S.L.W. 3202 (U.S. Oct. 6, 1975); *United States* v. *Crowley*, 504 F.2d 992, 994-95 & n.5 (7th Cir. 1974); *United States* v. *Kenny, supra*, 462 F.2d at 1229, *citing United States* v. *Nardello*, 393 U.S. 286, 289 (1969); W. LaFave & A. Scott, Criminal Law, § 95 at 704 (1972). The misuse of public office is said to supply the element of coercion. *United States* v. *Mazzei*, 521 F.2d 639, 644-45 (3d Cir. 1973) (en banc), *cert. denied*, 44 U.S.L.W. 3344 (U.S. Dec. 8, 1975). Threats, fear and duress became express elements only when the crime was later broadened to include actions by private individuals, who had no official power to wield over their victims. *United States* v. *Crowley, supra; United States* v. *Kenny, supra.* We thus find no error in the instruction given, permitting conviction upon a finding either that money was obtained under color of official right or else that its payment was induced by fear of economic loss, both theories having been charged in the indictment.

Respecting the "official right" theory, defendants assert that the charge erroneously allowed the mere passive receipt of money to establish a violation. This, they contend, would be bribery, not extortion. We agree, however, with recent federal decisions indicating that bribery and extortion as used in the Hobbs Act are not mutually exclusive. *United States* v. *Braasch, supra*, 505 F.2d at 151 & n.7; *United States* v. *Kahn*, 472 F.2d 272, 278 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). Here, moreover, the court charged that the inducement had to come from the official:

> "[W]here the initiative and the inducement for the payment comes from or is on the part of the public officials, and not the voluntary payment on the part of

> the so-called victim, it is this wrongful use of the office clothed with power of authority that converts official action into extortion."

This instruction clearly precluded conviction based upon the passive receipt of money. Indeed, to the extent it suggested that the initiative had to come *solely* from the official, it may have been even more favorable to the defense than was strictly necessary.

Defendants further complain that the court erroneously charged that "as a matter of law" Baptista was a public official for purposes of § 1951. They would have us infer this from the court's refusal of their request for an instruction requiring proof that Baptista had the "direct administrative or operating authority to approve, disapprove or otherwise direct the action of the New Bedford Redevelopment Authority as to whether it would award each contract to Meridian." The court instead charged that if Baptista "used the office of Executive Director of New Bedford Redevelopment Authority to initiate and induce payments", the inducement to part with money was extortion.

We find no error. "Under color of official right" includes the misuse of office to induce payments not due. The relevant question was whether Baptista imparted and exploited a reasonable belief that he had effective influence over the award of Authority contracts. *United States* v. *Meyers*, No. 75-1743, slip op. 8-9 (7th Cir. Feb. 12, 1976); *United States* v. *Mazzei, supra*, 521 F.2d at 643; *see United States* v. *Staszcuk, supra*, 502 F.2d at 878. There was considerable evidence that as Executive Director Baptista was, and appeared, able to influence the awarding of contracts. To be sure, as defendants point out, Baptista's statutory power was subordinate to that of the Authority's board, M.G.L. c. 121B, and various members testified that the board had not always in the past ratified Baptista's recommendations. Still, Graham testified that he went to Bap-

tista because Lucas led him to believe that to obtain a contract he would have to pay Baptista. Baptista thereafter agreed, for a consideration, to furnish a contract, and Meridian in fact received a contract. These and subsequent events bore witness to Baptista's power. Moreover, in the summer of 1971, Baptista was able to give Graham advance assurance that the board would approve Meridian at its next meeting. And in 1972, Baptista told Graham that he was under local pressure to award the NDP contract to a local firm, implying that the award was his own decision. Thereafter he redirected the contract to Meridian. The evidence was thus more than adequate that Baptista could influence awards, and that he exploited this ability.

Besides challenging the "official right" aspect of the extortion charged, defendants assert error with respect to the alternative theory set forth in the indictment; namely, extortion by fear of economic loss. As well as "under color of official right", the Hobbs Act encompasses extortion through actual or threatened violence, threats, or fear, 18 U.S.C. § 1951(b)(2). *See United States* v. *Addonizio, supra.* "Fear" includes fear of economic loss. *Id.* at 72; *Bianchi* v. *United States*, 219 F.2d 182, 189 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955). The indictment charges defendants with soliciting money, and Graham and Meridian with paying it in order "to prevent economic loss", described as an inability to obtain contracts with the Authority. Defendants contend that Graham was as a matter of law incapable of being extorted through fear of economic loss, both because he was no stranger to the bribing of officials and because Meridian had no prior entitlement to the two no-bid contracts and thus no "economic loss" to fear.

Graham undoubtedly had a striking and, one might say, colorful history of paying off officials. He testified to bribing the majority leader of the Pennsylvania House,

the treasurer of the State of New Jersey, and the mayor of Lancaster, Pennsylvania. These payments were entered on Meridian's books as administrative travel expenses. He also admitted to giving the chairman of the Republican Party of Bucks County, Pennsylvania, an interest-free loan which was partly forgiven, and to employing an attorney who performed little by way of legal services, but apparently was adept at insuring the continuation of state jobs in New Jersey. In August, 1972, on the day before his meeting with Baptista, Graham met with one Jerry Sands in New York, whom Graham used on two or three occasions as a "money laundry" to take money from Meridian for his own personal use, by authorizing payment on fake invoices. On all this evidence, defendants urge, Graham was unextortable as a matter of law.

However, as we have said, bribery and extortion are not mutually exclusive. The court cautioned the jury that voluntary payments by Graham would not amount to extortion; and viewing the evidence in a light most favorable to the Government, there is sufficient evidence for the jury to have found that Graham paid Baptista involuntarily in the sense that he otherwise feared Meridian's preclusion from business with the Authority. Graham's overtures to Baptista followed upon Lucas' advice that to procure a contract he would have to pay Baptista. Since Lucas & Edwards, Inc., was already performing work for the Authority (and since, indeed, Lucas even accompanied him to the first meeting with Baptista), Graham had every reason to accept that Baptista was dealing in this manner. It was Graham's testimony that he agreed to the 1971 payments because otherwise Meridian would not have received the WEP contract. The extortionate aspect is even clearer with respect to the second contract. Baptista dangled the NDP contract before Graham at their first meeting in 1971. Thereafter he told Graham that he was

under pressure to engage a local firm. Graham responded by agreeing to pay, and Baptista then arranged the matter in Meridian's favor. The jury could believe that Baptista manipulated the situation to play upon Graham's fear of missing out on the contract. To be sure, on both occasions, Graham himself may have first brought up the subject of payments. But the jury could find that the impetus came from a reasonable apprehension that, without paying, Meridian would not be considered by the Authority. Baptista's exploitation of such a fear amounted to extortion notwithstanding Graham's readiness and even eagerness to play the game. *See United States* v. *Kahn, supra,* 472 F.2d at 277-78.

Defendants also argue that, since Meridian was seeking a no-bid personal service contract, it had no existing property right within the meaning of the Hobbs Act. Graham and Meridian, they say, would not suffer or fear an economic loss if they failed to procure such a contract. However, given the broad purpose of the Hobbs Act, the argument is hypertechnical. The emphasis in extortion is on the coercion by the defendants, *cf. United States* v. *Braasch, supra,* and the resulting fear created in the victim's mind. Clearly some kind of "property rights" would have to be involved, or otherwise there would be no motivation for the victim's acquiescence in the demands of the defendant. But a narrow perception of property rights or economic loss is misdirected.[6]

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[6] The Hobbs Act itself refers only to fear, without specific mention of fear of economic loss, although courts have held that the latter is within the kinds of fear contemplated by the Act. *See Bianchi* v. *United States,* 219 F.2d 182, 188-89 (8th Cir.), *cert. denied,* 349 U.S. 915 (1955). The proper focus, therefore, is whether the victim's interest, economic or otherwise, was sufficient to give rise to fear. Collateral inquiry into the kind of economic interest at stake is of little significance except as it may indicate that the victim had no grounds for fear.

Defendants refer to early Hobbs Act cases, where rights or privileges already the victims' were threatened by unwarranted interference,[7] and cases where contractors already engaged in public construction projects have been compelled to make payments to avoid losing their contracts, *United States* v. *Kenny, supra; United States* v. *Addonizio, supra.* But none of those cases expressly rule out the sort of fear alleged here. In *United States* v. *Tropiano,* 418 F.2d 1069 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970), the court said,

> "The concept of property under the Hobbs Act . . . includes, in a broad sense, any valuable right considered as a source or element of wealth . . . . The right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution. [The] right to solicit accounts . . . constituted property within the Hobbs Act definition."

418 F.2d at 1075-76 (citations omitted). Similarly, we think the possibility of lost business opportunities can create a fear of economic loss. *Contra United States* v. *Kubacki,* 237 F. Supp. 638, 640-42 (E.D. Pa. 1965).

We turn next to defendants' claims of error with respect to the Hobbs Act requirement that the extortion affect commerce. The indictment charged attempted obstruction, delay, and effect upon interstate commerce and the movement of materials, equipment, services and supplies therein.

Defendants argue that the judge erred in instructing

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[7] Defendants cite only *Bianchi* v. *United States, supra* (payment to avoid unwarranted work stoppage), and *United States* v. *Provenzano,* 334 F.2d 678 (3d Cir.), *cert. denied,* 379 U.S. 947 (1964) (payments to induce truckers to perform tasks already required under their pre-existing contract).

the jury that only a slight or minimal impact on interstate commerce need be shown and in rejecting their requested instruction that the depletion of Meridian's assets had to adversely affect interstate commerce.[8] However, it has been consistently held that the alleged extortion need only have a *de minimis* effect on interstate commerce. *United States* v. *Shackelford,* 494 F.2d 67, 75 (9th Cir.), *cert. denied,* 417 U.S. 934 (1974); *United States* v. *DeMet,* 486 F.2d 816, 822 (7th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974); *United States* v. *Addonizio, supra,* 451 F.2d at 74-77; *United States* v. *Tropiano, supra,* 418 F.2d at 1076-77. The Hobbs Act by its own terms forbids extortion which affects commerce "in any way or degree", 18 U.S.C. § 1951(a), and has accordingly been held to reach even those effects which are "merely potential or subtle". *United States* v. *Augello,* 451 F.2d 1167, 1169-70 (2d Cir. 1971), *cert. denied,* 405 U.S. 1070 (1972). *See also United States* v. *Mazzei, supra,* 521 F.2d at 642-43. Indeed, the seventh circuit has gone as far as to require only a "realistic probability that an extortionate transaction will have some effect on interstate commerce". *United States* v. *Staszcuk, supra,* 517 F.2d at 60. Thus, the instruction was correct.

Defendants contend that there was no evidence of even a minimal affect on commerce. Meridian made twice its average profit on the 1971 contract, and performed its obligations to the Authority. However, there was some evidence that the payoffs adversely affected the sums

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[8] The judge, in defining the requisite impact on interstate commerce, specifically told the jury that if they believe "that the diminution of Meridian profits adversely affects its ability to engage in interstate commerce, even to a minimal degree, the requisite delay, obstruction, or effect upon interstate commerce has been proved." It is questionable, then, whether defendants even characterize the court's charge properly when they say it does not require a showing of adverse effect.

available to Meridian personnel concerned with the project; and, more basically, paying off Baptista of necessity depleted the funds of the company, an out of state firm operating interstate. The latter impact was enough. *See United States* v. *Mazzei, supra,* 521 F.2d at 642.

Defendants further contend that the admission of evidence on the question of interstate commerce by a Connecticut subcontractor for WEP, Robert D'Angelis, constituted a prejudicial variance or amendment of the indictment. The argument is frivolous. The language to which defendants refer, mentioning engineering services, appears in the introductory paragraphs of the indictment, not the charging paragraphs; and the charging paragraphs are examined when considering whether there has been a variance between pleading and proof. *Cf. Gaither* v. *United States*, 413 F.2d 1061, 1071 (D.C. Cir. 1969). The language of the charging paragraphs fairly covers evidence of the type introduced through D'Angelis.[9] *Cf. United States* v. *Staszcuk, supra,* 517 F.2d at 55 n. 3, 56.

II

Defendants were convicted not only of Hobbs Act violations but also of violations of 18 U.S.C. § 1952, the so-called Travel Act, all the violations arising from the same transactions. The Travel Act provides:[10]

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

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[9] *United States* v. *Stirone*, 361 U.S. 212 (1960), on which defendants rely, is entirely inapposite. In that case, the indictment charged interference only with sand shipments, whereas the trial judge's instructions and the proof offered at trial included concrete shipments, part of a later stage in the manufacturing process. The Supreme Court held that there was a variance and reversed. Here the indictment was framed in general language and the proof at trial came within that general language.

[10] In contrast to the broad interpretation given to the Hobbs Act, the Supreme Court has indicated that the Travel Act is to be read in a narrower and more restricted fashion. *Rewis* v. *United States*, 401 U.S. 808, 811-12 (1971).

> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section 'unlawful activity' means . . . (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States . . . ."

The indictment charged defendants with causing others to travel in interstate commerce and to use the facilities of interstate commerce so as to unlawfully solicit, agree to receive, and receive the payment of money in exchange for engineering contracts. 18 U.S.C. §§ 1952 & 2. Their objections go to the elements of travel or use of an interstate facility, and to the nature of the purported "unlawful activity".

Defendants argue that the court erred in instructing that Graham's interstate travel and Meridian's use of the mail would sustain a conviction under the Travel Act. The court instructed that if the defendants "caused or induced Graham to travel from Philadelphia to New Bedford" or caused Graham to use the mails, the interstate component of the Travel Act would be satisfied. In *Rewis* v. *United States*, 401 U.S. 808 (1971), the Supreme Court, reversing a conviction under the Travel Act, held that the interstate travel of patrons from Georgia to a Florida gambling operation could not be imputed to defendants,

the operation's owners. The Court indicated, however, that a violation could occur if a defendant so actively encouraged patrons to travel interstate that his conduct approximated that of a principal in a criminal agency relationship. *Id.* at 814. We think the instruction here comported sufficiently with the analysis in *Rewis*. *See United States* v. *Marquez*, 449 F.2d 89 (2d Cir. 1971), *cert. denied*, 405 U.S. 963 (1972); *United States* v. *De Cavalcante*, 440 F.2d 1264 (3d Cir. 1971); 18 U.S.C. § 2(b).

The evidence, it is true, was likely insufficient to support a jury finding that Baptista caused Graham to travel to New Bedford.[11] But evidence of Meridian's prearranged use of the mails to forward checks to defendants strongly supported a jury finding of a requisite interstate activity. When Baptista gave Graham the blank invoices for the purpose of making payments, he knew that Meridian was a Pennsylvania-based company and that the addresses on the invoices were in Massachusetts.[12] This use of the mails was more than "incidental", *United States* v. *Isaacs*, 493 F.2d 1124, 1146-49 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), for it was an important link in the interchange between defendants and Meridian. *Cf. United States* v. *Hedge*, 462 F.2d 220, 223-24 (5th Cir. 1972).

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[11] Graham was not in contact with Baptista immediately prior to his visits and there was no showing that Baptista approached him first. However, use of the mails is sufficient in and of itself, for § 1952 is phrased in the disjunctive, and even though the indictment alleges both travel and use of interstate facilities, the conviction can stand if the evidence establishing one of the means alleged is sufficient. *Turner* v. *United States*, 396 U.S. 398, 420 (1970); *United States* v. *Barbato*, 471 F.2d 918, 922 n. 3 (1st Cir. 1973).

[12] *United States* v. *Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), which defendants cite, is inapposite. There the interstate movement of checks was solely within banking channels after the checks had been deposited and taken out of the control of the defendants. *Id.* at 1045, 1048 (4th Cir. 1970), where even that limited activity was found to give rise to a violation of the Travel Act.

While the Travel Act is to be construed narrowly, see *Rewis* v. *United States,* this conduct falls squarely within the language of 18 U.S.C. § 1952. *See United States* v. *Archer,* 486 F.2d 670 (2d Cir. 1973).

With respect to the element of "unlawful activity", defendants argue that the court erred in allowing the jury to convict upon proof of bribery rather than proof of extortion only. However, the Travel Act, unlike the Hobbs Act, punishes bribery (as well as extortion) that is "in violation of the laws of the State in which committed . . . ." 18 U.S.C. § 1952(b)(2). In charging the jury on the Travel counts, the district court stated that a Massachusetts statute, M.G.L. c. 268A, § 2(b),[13] was the applicable state law and pointed out, quite properly, a distinction between the elements of extortion in the Hobbs Act counts, and the crime described in c. 268A, § 2:

> "It is not necessary to show that there was any duress or compulsion with respect to the agreement to pay or the actual payment in that case. Of course if the transaction between Graham and Baptista does not rise above a voluntary payment upon the part of Graham, the defendants cannot be found guilty on Counts 3 or 5 [the Hobbs Act counts]. They can be found guilty upon Counts 4 and 6 [the Travel Act counts] insofar as the unlawful activity is concerned, namely the question of, to describe it briefly, the kickback, if you find that that has been proved to your satisfaction beyond a reasonable doubt."

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[13] Chapter 268A, §2 is directed in part against:

"(b) Whoever, being a state, county or municipal employee or a member of the judiciary or a person selected to be such an employee or member of the judiciary, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value for himself or for any other person or entity, in return for

(1) being influenced in his performance of any official act or any act within his official responsibility . . . ."

In so charging, the court declined defendants' requested instruction, that they could be found guilty under the Travel Act counts only if the jury found that their actions constituted extortion.

We find no error. Convictions based on findings both of extortion and a violation of the Massachusetts statute would be perfectly consistent. It is true that one not guilty of extortion might still violate the statute. But the court took care of this possibility by explaining to the jury that if no more than a voluntary payment by Graham was found, there could be no Hobbs Act conviction. There was no prejudice in the submission, under the Travel Act, of the broader theory.

Defendants also allege a variance between the unlawful activity described in the Travel Act counts and the Government's proof. We find none. While the Travel Act counts initially refer to defendants' actions as "in furtherance of the plan and purpose" to commit the offenses charged in the conspiracy and Hobbs Act counts, they go on to define the specific unlawful activity as the "solicitation, agreement to receive, and receipt of money . . . in return for a contract for engineering services with the New Bedford Redevelopment Authority." This language encompasses the crime set forth in the state statute cited at trial, c. 268A, § 2, which is not limited to extortion. *See United States* v. *Nardello,* 393 U.S. 286 (1969).

Defendants also object to the application of M.G.L. c. 268A, § 2 to Baptista, asserting that his authority as Executive Director was too slight to bring him within that statute. The statute punishes the solicitation or receipt of money by a public employee in return for being influenced in his performance either of any official act or any act within his official responsibility. *Id.* (b)(1). Defendants contend that Baptista lacked "official re-

sponsibility", defined in § 1(i),[14] as he was empowered only to assist and advise the Authority. Be that as it may, § 2(b)(1) also embraces "official act[s]", defined as "any decision or action in a particular matter[15] or in the enactment of legislation", § 1(h). Baptista's advice and assistance to the Authority, which defendants concede he was empowered to render, would clearly constitute "official acts" under c. 268A, § 2(b)(1).

III

Defendant Hathaway contends that the verdicts against himself, based in the substantive counts on the theory of aiding and abetting, 18 U.S.C. § 2, were contrary to the weight of the evidence, and that the district court erred in denying his motions for judgment of acquittal and for a new trial. Hathaway says that there was no showing of the knowledge, intent, and participation requisite for a conviction.

To be convicted of aiding and abetting, it is necessary that a defendant in some way "associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.), *quoted in Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949). Participation in every stage of an illegal venture is not required, only participation at some stage accompanied by knowledge of the result and intent to bring about that result. *Id.*

Hathaway paints himself as a shadowy figure, whom Graham never met or even knew existed. However, while

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[14] Section 1(i) defines "official responsibility" as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove, or otherwise direct agency action."

[15] " 'Particular matter' [is] any . . . application, submission, request for a . . . contract . . . ." c. 268A, § 1(k).

there was some conflicting testimony as to his role,[16] we think the evidence supported a finding that he had knowingly and intentionally participated. Baptista furnished Graham with Hathaway's blank invoices, and Graham mailed checks made out to Hathaway, along with copies of the invoices, to Hathaway. Although none of the bank employees recalled cashing these specific checks, Hathaway was personally known to them, the checks were made payable to him, and his was the sole endorsement. It could be inferred that he alone cashed them. In addition, Baptista's secretary called the bank for Hathaway prior to his cashing checks. From these and related facts, the jury could conclude that there was no reasonable hypothesis but that Hathaway was a willing participant in Baptista's scheme.

Hathaway contends that there could be no aiding and abetting as there was no showing of the commission of the crimes by a principal, it not having been established that Baptista obtained property or money from Meridian. However, Graham testified that Baptista told him he received the first payment. And even were this not so, as the checks were cashed by Baptista's parsonally designated associate, the jury could infer that the benefit was passed on to the principal. *See United States* v. *Provenzano,* 334 F.2d 678, 686 (3d Cir. 1964).

We likewise reject Hathaway's argument that his conviction as an aider and abettor cannot stand since there was no public officer who acted as principal. As previously discussed, the evidence on this score was adequate as to Baptista.

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[16] There was evidence that Hathaway was hospitalized when one of the 1972 checks was cashed, and that the checks were sent to his former residence where no mail reportedly came for him during the years in question.

IV

Defendants contend that the court improperly refused their requested instructions on the two conspiracy counts.[17] They concede that the more general instruction along the same lines which the court gave [18] was correct, but contend that it should have gone further to guard against the Government's purported attempt to prove conspiracy by association alone. However, the Government's proof went well beyond mere association, and association, while not dispositive, is at least relevant. *See United States* v. *Armone,* 363 F.2d 385, 403-04 (2d Cir.), *cert. denied,* 385 U.S. 957 (1966). The court correctly cautioned the jury against paying exessive attention to such evidence. There was no error.

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[17] Defendants were charged in separate counts with conspiracy in violation of the Hobbs Act, 18 U.S.C. § 1951, and under the Travel Act, 18 U.S.C. § 1952, and 18 U.S.C. § 2 in violation of 18 U.S.C. § 371.

They requested the following instructions:

> "23. Evidence of the presence of the Defendant Hathaway in the office of the New Bedford Redevelopment Authority or in the office of the Defendant Baptista on one or more occasions does not establish proof of the existence of a conspiracy between the defendants.
>
> 24. Evidence that the Defendant Baptista was in the Southeastern Bank and Trust Company on one or more occasions when the Defendant Hathaway cashed a check there does not establish proof of the existence of a conspiracy between the defendants."

[18] The instruction given was:

> "Mere association of two persons, the mere presence of one so-called conspirator with another is not enough to prove conspiracy. The acts and conduct of the alleged conspirators must furnish to the jurors for their consideration and for their determination evidence which justifies them in finding intention upon the part of the conspirators to participate in the agreement to commit a crime and to accomplish an unlawful purpose. Mere association or presence of one with the other at any time, at any time during the period of time alleged in the indictment, is not by itself sufficient and it must be the acts and conduct of the defendants, the circumstances under which they acted that can provide for the jury the basis of their determination."

Defendants also contend that the evidence was insufficient to prove an agreement. We disagree. While there was no direct proof of an agreement, there was circumstantial evidence of one. The availability of the blank invoices and the cashing of the checks give rise to the strong inference that Hathaway and Baptista were working in combination, pursuant to a criminal agreement. The jury could infer that Hathaway knew all along of the use to which Baptista would be putting the blank invoices and that the agreement therefore predated the June, 1971, meeting between Baptista, Graham, and Lucas.[19]

As regards each of the two conspiracy counts, defendants contend that at the very most the Government proved conspiracy only in 1972 and not continuing from May, 1971, to December, 1972, as alleged in the indictment. They assert that they were therefore prejudiced by the district court's refusal to require the Government to elect between the separate 1971 and 1972 conspiracies, since the indictment was duplicitous and there was a variance from the indictment as charged. However, we think the evidence was sufficient to show a continuing conspiracy covering both years. The same method of payment was used in both 1971 and 1972; the same parties were involved; the payments were made for the same purpose, procuring engineering contracts from the Authority; and during the meeting in June, 1971, Baptista spoke of the forthcoming NDP project and said that Meridian might be considered. The discontinuity in time between the last WEP payment, in November, 1971, and the meeting about the NDP contract in August, 1972, does not necessarily

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[19] Defendants assert a fatal variance because the indictment alleges that the conspiracy began in May, 1971, and there was no proof of that precise date of its commencement. However, the conspiracy was within the period charged and any discrepancy was insubstantial. *See United States* v. *Postma*, 242 F.2d 488, 496-97 (2d Cir.), *cert. denied*, 354 U.S. 922 (1957).

divide this continuing mode of operation into separate conspiracies. *Compare United States* v. *Russano,* 257 F.2d 712 (2d Cir. 1958).

V

Finally we deal with defendants' claims of error as to several rulings, the first of which dealt with the right to cross-examine Graham. The Government interrupted its direct examination of Graham in order to call other witnesses. This was done to conform to the district court's requirement that the Government submit all its evidence of conspiracy before submitting any coconspirators' declarations. The court adopted this order of presentation so as to make sure that the quantum of independent non-hearsay evidence was adequate to support the required elements of the conspiracy and defendants' participation in it. *Cf. United States* v. *Honneus*, 508 F.2d 566, 577 (1st Cir. 1974), *cert. denied,* 421 U.S. 948 (1975) (requiring a timely limiting instruction, though not necessarily this order of presentation).

Defendants did not object during the trial either to the order of proceeding or to the court's accompanying rulings and instructions. Now, however, they assert that the court erred by limiting the defense to a single opportunity to cross-examine Graham, and further, that it was plain error to have announced a cut off in the non-hearsay proof prior to Graham's cross-examination. Whatever the pros and cons of the procedure, it was well within the court's discretion so to structure the admission of evidence. The object was not to invite a final determination of guilt or innocence at the conclusion of the Government's non-hearsay case in chief, but rather to protect each defendant against premature jury exposure to the declarations of coconspirators. At the close of trial, by which time Graham had been fully cross-examined, the jury was instructed at great length concerning its duty to weigh the credibility

of witnesses and was, of course, told to acquit if not satisfied of guilt beyond a reasonable doubt; it was also instructed then, as earlier, of the need for independent proof of the conspiracy and of defendants' involvement.

It is true that the court's limiting instructions after completion of the Government's non-hearsay case did not expressly tell the jury to consider the cross-examination yet to come when weighing the Government's proof on the hearsay counts. But counsel did not request any such instruction or raise any objection, and we cannot discern plain error either in what the court said or did not say at the time. Fed. R. Crim. P. 52(b).

Defendants also argue that the district court improperly excluded cancelled checks from another company, the Campanella Corp., which had been cashed by Hathaway at the Southeastern Bank. We find no error in the court's exclusion of the proferred evidence as irrelevant or, at least, so marginal that any possible relevance was outweighed by its tendency to mislead and confuse. Fed. R. Evid. 403.

VI

Defendants also seek to assert alleged improprieties in the grants of immunity to four Government witnesses. *See* 18 U.S.C. § 6003. The short answer is that a challenge to a grant of immunity, like assertion of the privilege against self-incrimination, is personal; defendants are without standing to contest the legal sufficiency of the granting of immunity by the Government to these witnesses. *United States* v. *Lewis,* 456 F.2d 404, 408-10 (3d Cir. 1972); *cf. Lopez* v. *Burke,* 413 F.2d 992, 994 (7th Cir. 1969). *See also United States* v. *White,* 322 U.S. 694 (1944); *Hale* v. *Henkel,* 201 U.S. 43 (1906); *United States* v. *LePera,* 443 F.2d 810, 812 (9th Cir.), *cert. denied,* 404 U.S. 958 (1971); *Long* v. *United States,* 360 F.2d 829, 834 (D.C. Cir. 1966); *United States ex rel. Berberian* v. *Cliff,* 300 F. Supp. 8, 14-15 (E.D. Pa. 1969).

We also find no reversible error in the court's handling of the controversy that surfaced early in the trial concerning nondisclosure of a Goverment letter promising not to prosecute Meridian employees. The court has discretion in the handling of alleged non-compliance with discovery orders, Fed. R. Crim. P. 16(d)(2), and we find no such evidence of deliberate Government misconduct or prejudice as to require a different disposition from that adopted by the court.

Affirmed.

APPENDIX E

18 U.S.C., § 2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

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18 U.S.C., § 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

June 25, 1948, c. 645, 62 Stat. 701.

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18 U.S.C., § 1951. *Interference with commerce by threats or violence*

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this

section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person, or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 13, sections 52, 101, 110, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

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18 U.S.C. § 1952. *Interstate and foreign travel or transportation in aid of racketeering enterprises*

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub.L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498, and amended Pub.L. 89-68, July 7, 1965, 79 Stat 212.

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18 U.S.C., §2514. *Immunity of witnesses*

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney

General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

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18 U.S.C. § 6003. *Court and grand jury proceedings*

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination. Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.
